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IN THE

Supreme Court of the United States

WILLIAMS CONTROLS, INC.,
Petitioner,

v.

BRAULIO M. CUESTA and ERIC L. GOLDEN,
Individually and on Behalf of
All Others Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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PETITION FOR A WRIT OF CERTIORARI

GREGORY D. NELLIS
MARTHANDA J. BECKWORTH
ATKINSON HASKINS, NELLIS, BRITTINGHAM, GLADD & CARWILE, P.C.
1500 ParkCentre,
525 South Main
Tulsa, Oklahoma 74103
(918) 582-8877

KURT STITCHER
Counsel of Record
DAVID W. PORTEOUS
ELIZABETH B. VANDESTEEG
LEVENFELD PEARLSTEIN, LLC
2 North LaSalle Street,
Suite 1300
Chicago, Illinois 60602
(312) 476-7597

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

In *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), the Oklahoma Supreme Court held that in a putative nationwide class action asserting breach of warranty claims against a product manufacturer, the Oklahoma courts *must* apply the law of the defendant's principal place of business to all class members' claims. In the case below, the Court significantly extended its *per se* rule by applying the law of one defendant's home state (Ford Motor Co. and Michigan) to a second defendant (Williams Controls, Inc.) that had no relevant contacts with that jurisdiction, and it did so without any individualized choice-of-law analysis as to the jurisdiction, the putative class members' claims, or the second defendant. Specifically, the class alleges that Williams Controls, Inc. (WCI) breached express and implied warranties by designing and manufacturing a defective accelerator pedal, yet the alleged conduct at issue – design and manufacture – occurred *outside of Michigan*. Despite the lack of any connection between each class member's claims, WCI, and Michigan, the Oklahoma Supreme Court held that the application of Michigan law to WCI was both proper and in accordance with constitutional standards, thereby ensuring certification of a nationwide class.

The questions presented are:

(1) Whether Oklahoma's *per se* rule requiring the Oklahoma courts to apply the law of one defendant's principal place of business to all breach of warranty claims in a putative nationwide class action, without undertaking any individualized analysis regarding the connection between the state, each class member, the class member's claims, and each defendant, violates the Due Process Clause.

(2) Whether the Oklahoma Supreme Court violated WCI's due process rights by applying Michigan law to WCI where there is no connection between Michigan, WCI's allegedly wrongful conduct, and each class member's claims against WCI.

(3) Whether the Oklahoma Supreme Court is violating the rights of class action defendants under the Full Faith and Credit and Due Process Clauses by subjecting these defendants, such as WCI, to liability under one state's law that they would not face under the law of other states where putative class members reside.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Williams Controls, Inc., was a defendant in the District Court of Bryan County, Oklahoma; an Appellant in the Oklahoma Court of Civil Appeals; and a Respondent before the Oklahoma Supreme Court.

Ford Motor Company, which is not a party to this Petition, occupied the same roles as did WCI in the Oklahoma courts below.

Respondents were plaintiffs in the District Court of Bryan County; Appellees in the Oklahoma Court of Civil Appeals; and Petitioners before the Oklahoma Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Williams Controls, Inc. (WCI), is a Delaware corporation whose common stock is publicly held. WCI has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Williams Controls, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court (Pet. App. D 69a – 91a) is reported at 209 P.3d 278. The order of the Oklahoma Court of Civil Appeals denying rehearing (Pet. App. C 68a) is unreported. The opinion of the Oklahoma Court of Civil Appeals (Pet. App. B 37a – 67a) is unreported. The opinion of the District Court of Bryan County (Pet. App. A 1a – 36a) is unreported.

JURISDICTION

The Oklahoma Supreme Court entered its judgment on April 21, 2009. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Full Faith and Credit Clause, U.S. CONST., art. IV, §1, provides, in pertinent part:

> Full Faith and Credit shall be given in each State to the Public acts, Records, and Judicial Proceedings of every other State.

The Due Process Clause of the Fourteenth Amendment, U.S. CONST., amend. XIV, §1, provides:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. §1738 provides, in pertinent part:

> [The] Acts [of a State legislature], records and judicial proceedings [of a State court] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On January 1, 2006, Braulio M. Cuesta and Eric L. Golden, citizens and residents of Oklahoma, filed an amended petition in Oklahoma state court on behalf of a putative nationwide class of over 500,000

purchasers, owners, and/or lessees of certain Ford Motor Company ("Ford") vehicles that contain (or contained) an allegedly defective accelerator pedal assembly designed and manufactured by two former subsidiaries of Petitioner WCI. According to plaintiffs, the alleged defect causes the vehicle to shift to idle when unspecified extreme forces on the pedal assembly create an "overload" condition. Based on these allegations, plaintiffs asserted claims against Ford and WCI for breach of express and implied warranties, negligence, and strict products liability. Plaintiffs further asserted that class treatment across 51 U.S. jurisdictions was proper, because all putative class members own essentially identical Ford trucks equipped with essentially identical pedals, such that all class members suffered from the same alleged "design and/or manufacturing" defect.

Petitioner WCI is a Delaware corporation with its principal place of business in Portland, Oregon. WCI does not design, manufacture, market, or sell any product. Rather, WCI is a holding company that owns (or owned) shares of separately-incorporated operating subsidiaries, including Aptek Williams, Inc., and Proactive Acquisition Corp. (collectively, the "Former Subsidiaries"). The Former Subsidiaries were Florida corporations that had their principal places of business in Florida. They developed, designed, tested, and built the relevant pedal assemblies at, and sold them "FOB" from, their facilities in Florida. Plaintiffs have never named the Former Subsidiaries as defendants in this action.

Ford is a Delaware corporation with its principal place of business in Dearborn, Michigan. Ford designed, manufactured, and sold the trucks and

SUVs at issue in this case. Although Ford's truck design center is located in Michigan, Ford assembled the class vehicles at plants in Kentucky and Mexico (where the pedals were installed), conducted testing of the trucks in Arizona, and sold the trucks throughout the United States.

II. OKLAHOMA DISTRICT COURT PROCEEDINGS

On March 1, 2007, the District Court of Bryan County, Oklahoma, certified in its entirety plaintiffs' proposed nationwide class. Two of the District Court's findings are most relevant here. First, the District Court found that four "common questions of law and fact exist in this case: (1) whether the accelerator pedals at issue are defective; (2) whether the pedals are unreasonably dangerous; (3) whether the pedals reduce the value of the vehicles; and (4) whether the sale of the vehicles . . . constitutes a breach of express or implied warranty by Defendants." App. A 15a.[1] Despite the District Court's reference to "common questions of law," however, the court did not cite the law of any jurisdiction in its "commonality" finding. App. A 19a.

Second, and perhaps recognizing that questions of fact (such as defect and breach) will not be "common" unless the applicable law is also "common," the Dis-

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[1] In reaching this conclusion, the District Court purported to make several subsidiary "findings," including (1) that the pedals failed to comply with Ford's engineering performance specifications (App. A 6a – 10a, 27a – 28a), which failure amounted to a "defect" in the pedals (App. A 27a), and (2) that a breach of warranty class may be certified, even where the vast majority of class members have never experienced a manifestation of the alleged defect (App. A 18a – 19a, 29a).

trict Court held that *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), both justified the District Court's finding as to common questions of fact (App. A 26a) and fully "*resolved the choice-of-law issues* presented here" (App. A 29a, emphasis added), because *Ysbrand* had established a *per se* "principal place of business" rule for identifying applicable law in a nationwide breach of warranty class action. Citing *Ysbrand*, the District Court found that "both Defendants have the most significant contacts with Michigan, and thus Michigan law applies not only to Plaintiffs' claims against Ford but also to their claims against WCI." App. A 30a. In reaching this conclusion, the District Court asserted that WCI (1) met with Ford in Michigan to "pitch" its pedals, (2) designed its pedals to "Michigan standards," and (3) "negotiated the pedal contract" from "its Michigan office." App. A 29a – 30a.

The District Court did not undertake *any* choice-of-law analysis with respect to the individual class member's particular claims against either Ford or WCI. Instead, it let *Ysbrand* "resolve" that issue preemptively. At no point in its 37-page Order did the District Court ever address the constitutional choice-of-law issues that WCI had raised in opposing plaintiffs' motion for class certification, including due process, federalism, full faith and credit, and the Commerce Clause.

III. OKLAHOMA APPELLATE COURT PROCEEDINGS

Ford and WCI appealed the District Court's order. In its briefing to the Oklahoma Court of Civil Appeals (COCA), WCI directly challenged the District Court's failure to address the constitutional issues WCI had

raised below. Citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985), WCI asserted that the District Court had erred by failing to conduct a separate choice-of-law analysis as to each putative class member and that constitutional principles precluded the application of a single state's law to all parties.

WCI also urged the COCA to reject as irrelevant the District Court's "findings" with respect to alleged connections between Michigan and WCI. Relying on plaintiffs' allegations in the amended petition, WCI pointed out that (1) the class claims against WCI arose from an alleged defect in "design or manufacture" – both of which activities occurred *in Florida* – and not out of any "negotiations" between Ford and WCI in Michigan,[2] and (2) the origin of Ford's so-called "Michigan specifications" was irrelevant, because plaintiffs' defect claim was that WCI failed to meet those specifications, an alleged "failure" that occurred *in Florida*. *See supra* n.1. As such, there is no connection between WCI, Michigan, and the class claims that is relevant to a choice-of-law analysis with respect to WCI.

WCI further pursued its argument that Oklahoma cannot constitutionally use Michigan law to impose on the defendants liability for "unmanifested" defects when other states do not allow recovery for such alleged defects.

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[2] There is no record evidence, nor did the District Court cite any, to suggest that there was ever a contract between Ford and WCI (or its Former Subsidiaries) with respect to the pedals at issue in this case.

On March 21, 2008, the Oklahoma Court of Civil Appeals reversed the District Court and decertified the class. App. B 67a. After addressing the District Court's attempt to extend the *per se* rule of *Ysbrand* to this case (*e.g.*, App. B 58a – 61a), the COCA held that Michigan law could not apply, because the class claims against WCI lacked a sufficient nexus to Michigan. App. B 61a – 64a. Specifically, the COCA found, plaintiffs' theory of design and/or manufacturing defect hinged on WCI's alleged *non-compliance* with Ford's performance specifications. Because that non-compliance did not occur in Michigan, Michigan did not have the "most significant relationship" to, or an "intensity of interest" in, the dispute between WCI and the class. App. B 61a – 64a.

The COCA then stated that "[n]othing in the choice of law rules or class certification rules suggests that we pick one of several states out of a hat in order to find a most significant relationship simply to make certification seem more appropriate." App. B 63a. Noting the constitutional implications of the opposite view, the COCA observed that "deviation from the normal choice-of-law rules would be problematic if done on an *ad hoc* basis simply to support class certification" and found that such a deviation "would surely raise due process considerations." App. B 52a, 53a.

The COCA concluded by stating that because its analyses were dispositive on the class certification issue before it, it "d[id] not reach Appellant's other claims of error" (App. B 67a), which included the remainder of WCI's assertions of constitutional error.

IV. OKLAHOMA SUPREME COURT PROCEEDINGS

Plaintiffs then filed a Petition for a Writ of Certiorari to the Oklahoma Supreme Court. Based on limited written submissions,[3] the Oklahoma Supreme Court granted plaintiffs' petition and reversed the COCA.

In its opinion, the Oklahoma Supreme Court did not dispute that the class claims against WCI concerned conduct outside of Michigan, but it held, nonetheless, that "the law in Oklahoma as to UCC breach of warranty claims brought against manufacturers" compelled the application of Michigan law, because Michigan is "the state of Ford's principal place of business," which gave Michigan a "greater 'intensity of interest' than any other state involved." App. D 83a. Citing *Ysbrand*, the Court then declared that "Michigan's interest in the conduct of *its manufacturer*, and thus its connection to the *warranty issue*, is greater [than that of all other states]." App. D 80a (emphasis added).

Perhaps recognizing that WCI is not a "Michigan manufacturer" and that the class warranty claims

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[3] Under Oklahoma law, the grounds for such a Petition are strictly limited (OKLA. STAT. tit. 12, ch. 2, app. Rule 1.178(a)), and a party answering the Petition is limited to a 10-page brief addressing the non-existence of those grounds (OKLA. STAT. tit. 12, ch. 2, app. Rule 1.179(c)). The Oklahoma Supreme Court rules also make clear that "[t]he petition, answer and reply *shall not reach the merits of the appeal* but rather pertain to reasons [the] Supreme Court should review the decision of the Court of Civil Appeals." OKLA. STAT. tit. 12, ch. 2, app. Rule 1.179(d) (emphasis added). Because the Oklahoma Supreme Court accepted no further filings, WCI was limited to a single ten-page brief that did not "reach the merits of the appeal."

against WCI do not implicate any conduct by WCI in Michigan, the Court then strained to find "numerous and significant contacts" between WCI and Michigan. The Court first asserted, without any citation to record evidence, that WCI had entered into a contract with Ford in Michigan. App. D 81a. *See also supra* n.3.

The Court also observed that WCI had made the pedals for Ford trucks (App. D 81a), without explaining why doing so would somehow bind WCI to Michigan law, when the Former Subsidiaries sold the pedals to Ford in *Florida*, and Ford installed them on trucks in *Kentucky and Mexico*. *See supra* at p. 3.

The Court then averred that WCI had built the pedals to Ford's "Michigan specifications" (App. D 81a), without explaining what that term means or why it would be relevant when the conduct at issue was an alleged *failure to comply* with Ford's specifications,[4] which occurred *outside of Michigan*. *See supra* at 5.

Finally, and again without any reference to record evidence, the Court stated that "both Ford and Williams appeared to understand that Ford's requirements and specifications would govern the business relationship and that Ford directed the activities between the parties." App. D 81a.

The Oklahoma Supreme Court concluded that, given "the nature and extent of Williams' contacts *with Ford* in Michigan" the application of Michigan law to WCI was not unfair. App. D 83a (emphasis added).

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[4] The Oklahoma Supreme Court admits as much when it recounts plaintiffs' allegation that the "Williams pedals . . . failed Ford's 'overload' tests and engineering specifications." App. D 72a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance: Whether the Due Process and Full Faith and Credit Clauses permit a forum state court to apply another state's law to an entire class of plaintiffs and to multiple defendants – in clear contravention of a traditional choice-of-law analysis and without regard to the relationship between the challenged conduct and that other state – for the sole purpose of certifying a nationwide class in the forum state court. Ever since *Ysbrand,* Oklahoma has imposed a *per se* rule requiring the application of a defendant's home state law in putative nationwide breach of warranty class actions. In this case, Oklahoma applied that rule against WCI, even though WCI is not resident in the state whose law the Oklahoma courts selected (Michigan) and is not alleged to have engaged in the offending conduct in that state. That result, flowing naturally from the Oklahoma *per se* rule, clearly violates the constitutional teachings of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Moreover, the Oklahoma Supreme Court's holding below poses four major risks to the administration of civil justice in this nation and is, thus, of significant national interest. First, multi-defendant class actions are almost inevitable in consumer product cases, because manufacturers rely heavily on materials suppliers, component part and system suppliers, and distributors to get their products to market. These supply chain participants may be located all over the world, as foreign sourcing and distribution is an increasingly common phenomenon in our global economy. Concocting class actions against disparate supply chain entities by applying the law of the manufacturer's home jurisdiction to parties with no

relevant connection to that jurisdiction, as happened here, violates the Due Process Clause. With an increase in multi-defendant class actions, this problem will become ever more acute.

Second, as tort reform efforts around the country have suppressed nationwide product liability class actions, and as most states apply a "place of injury" standard for tort claims, the plaintiff's bar has migrated to "no injury" or "pure economic loss" class actions of the type at issue in this case. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (noting that plaintiffs described their injury as "financial rather than physical and seek to move the suit out of the tort domain and into that of contract . . . and consumer fraud"); *see also* Richard A. Nagareda, *Bootstrapping In Choice-of-Law After The Class Action Fairness Act*, 74 UMKC L. Rev. 661, 671 (2006) (stating that the use of a single state's law to justify nationwide classes "rest[s] upon an underlying shift in the way that class counsel characterize the class members' claims. . . . The shift consists of casting in a different guise – whether as contractual claims for breach of warranty or as fraud claims under state consumer protection law – matters that seemingly would sound more readily in tort law concerning product liability. A major part of the explanation for this shift in focus lies in the general hostility of courts toward nationwide product liability classes on choice-of-law grounds.")

In the case below, tort reform and an unsympathetic Supreme Court in Texas drove plaintiffs' Texas lawyers to file their putative nationwide class action in a post-*Ysbrand* jurisdiction that would, *per se*, apply the law of a single state, thus relieving plaintiffs of the need to perform the detailed choice-

of-law analysis that the Constitution, and most other states, require. Combining the "no injury" class with the Oklahoma *per se* rule, the Oklahoma Supreme Court has accelerated a "race to the bottom" with respect to the certification of putative nationwide class actions.

Third, and relatedly, the Oklahoma *per se* rule strongly encourages forum shopping, where plaintiffs' lawyers crowd into a few select jurisdictions that will give them a free pass on choice-of-law analyses and always find "common questions of law," simply by applying the law of one state to a putative nationwide class. In a long line of cases, beginning with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court has stated that forum shopping is highly disfavored. *See, e.g., Shutts*, 472 U.S. at 820; *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337 (1981) (Powell, J., concurring); *Boys Market, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 246 (1970); *Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

But given Oklahoma's choice-of-law rules in nationwide class actions, "the invitation to forum shopping" against which this Court has warned has become "irresistible." *Shutts*, 472 U.S. at 820. As one commentator recently observed:

> [E]fforts to apply a single state's law to the claims of a nationwide class have not ended with *Shutts*. In recent years, a small number of courts have certified nationwide classes in consumer litigation based upon the choice to apply a single body of law to the class – this time, not necessarily forum law but, rather, the law of the defendant's principal place of business.

Nagareda, 74 UMKC L. Rev. at 670. Absent this Court's intervention, states adopting such lenient choice-of-law rules will become magnets for putative nationwide class actions.[5]

Fourth, the Oklahoma *per se* rule usurps the authority of other jurisdictions to determine, legislatively, how best to protect their individual and corporate citizens. Although the Oklahoma Supreme Court justifies its rule with pronouncements about "predictability" and "uniformity" across the land, there is no federal or national product liability or warranty law, and who is Oklahoma to create one through the back door of its *per se* choice-of-law rule? Full Faith and Credit and Due Process do not abide this result or give the Oklahoma courts the power to arrogate to themselves the authority to, in effect, legislate for other jurisdictions.

In addition to the national implications of Oklahoma's *per se* rule, it must be noted that Oklahoma's position differs markedly from that of several other states who have recognized and upheld constitutional limitations on choice-of-law analyses in the context of nationwide class actions. *See, e.g., Compaq Computer Co. v. Lapray*, 135 S.W.3d 657, 680 (Tex. 2004) (recognizing, in decertifying a nationwide breach of contract/breach of warranty class under Texas law, that "[t]he Due Process Clause limits the extent to

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[5] Enactment of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), does not solve this problem, because a federal court sitting in diversity must use the choice-of-law principles of the state in which the court sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under *Klaxon*, then, a federal district court in Oklahoma must comply with *Ysbrand* when addressing choice-of-law questions in diversity cases, such as this case.

which one state's law can be applied to claims that arise in many states"); *Dragon v. Vanguard Indus., Inc.*, 89 P.3d 908, 918 (Kan. 2004) (holding that "full faith and credit and due process issues prevent Kansas from constitutionally applying its own substantive law to every claim unless it had 'a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair'"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360 (E.D. La. 1997).

Oklahoma's position also differs from that of Congress, which, in enacting the Class Action Fairness Act of 2005 (Pub. L. 109-2, 119 Stat. 4 (2005)), found that "Federal court consideration of interstate cases of national importance under diversity jurisdiction" was necessary to remedy "[a]buses in class actions [that] undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution . . . ." *Id.* at 5.

In sum, the case below raises issues of immediate national significance to all entities in the manufacturing supply chain and to consumers in 51 U.S. jurisdictions. It also points up a significant conflict between the highest court of the State of Oklahoma and those of its sister states, Texas and Kansas, on this critical issue. All of these factors militate in favor of granting certiorari to hear this important case.

I. BY IMPOSING A *PER SE* "SINGLE HOME STATE" CHOICE-OF-LAW RULE, THE OKLAHOMA SUPREME COURT IS VIOLATING EVERY LITIGANT'S DUE PROCESS RIGHT TO AN INDIVIDUALIZED CHOICE-OF-LAW ANALYSIS.

A. Due Process, As Construed In *Shutts*, Requires An Analysis Of Relevant Contacts Between Each Party, Plaintiffs' Claims, And Each Jurisdiction Whose Law Might Be Applied To The Dispute.

This Court has made clear that while states may adopt their own choice-of-law rules, the Constitution limits the unfettered application of those rules in any given case. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985). In *Shutts*, this Court considered the claims of a nationwide class of plaintiffs who brought suit in Kansas state court against an out-of-state corporation. The Kansas Supreme Court, citing both the plaintiffs' choice of forum and Kansas's preference for applying its own law in its courts, applied Kansas substantive law. 472 U.S. at 803. This Court reversed, holding that Kansas could not constitutionally apply its substantive law to the claims of each member of the class, because there were insufficient contacts between Kansas, the named defendant, and each class member. *Id.* at 818-20.

In so holding, this Court explained that "the issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice-of-law." *Id.* at 821. Even though Kansas could exercise personal jurisdiction over both the defendant and the non-opt-

out class members, Kansas could not "bootstrap" contacts relevant to *personal* jurisdiction into contacts sufficient for the application of substantive Kansas law to claims in which Kansas would otherwise have no cognizable interest. *Id.* This Court then ruled that "[g]iven Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, . . . application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822. Indeed, this Court found, if a plaintiff's "contacts" with the defendant lack a relation to the state at issue, it is unconstitutional to apply that state's law to the dispute between the parties. *Id.* at 823.

The rule in *Shutts* is clear: It is not enough that the dispute, a single defendant, or the plaintiff class *as a whole* has significant contacts with a single state. Rather, in order to comport with the Due Process and the Full Faith and Credit Clauses, any state whose law might be applied to the class "must have 'a significant contact or significant aggregate of contacts' *to the claims asserted by each member of the plaintiff class*, contacts creating state interests, in order to ensure that the choice of [that state's] law is not arbitrary or unfair." *Id.* at 822 (citing *Allstate Ins. Co.*, 449 U.S. at 312-313) (emphasis added). In light of the important constitutional issues at stake, this Court found, a "more thoroughgoing treatment" is required to demonstrate that a single state has an interest in each plaintiff's claims sufficient to "support the application of only [one state's] law to all these claims." *Id.* at 818, 820.

Thus, in conducting a choice-of-law analysis in the class action context, the forum court must consider

each affected state's interest in the conduct at issue as to the claim of each individual member of the putative class and as to each defendant, not as to the litigation as a whole. A state may not dilute the requisite constitutional inquiry merely to facilitate class treatment of a set of claims. *Id.* at 821. Indeed, under *Shutts*, the court may not even *consider* the asserted existence of a class when engaging in the required choice-of-law analysis. *Id.* at 822. Instead, every court must approach its choice-of-law analysis as though it were assessing individual suits between each plaintiff and each defendant.

B. Oklahoma's *Per Se* Rule Violates *Shutts* By Circumventing The Required Individualized Choice-of-Law Analysis.

Contrary to the clear constitutional limitations set forth in *Shutts*, the Oklahoma Supreme Court has imposed a *per se* rule that in putative nationwide warranty class actions, Oklahoma courts *must* apply the law of the principal place of business of a single defendant. *See Ysbrand*, 81 P.3d at 626; *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 2008 OK 67, ¶12 (Okla. 2008) (finding that "[u]nder the 'most significant relationship' test applied in *Ysbrand*, Michigan law applies" to DaimlerChrysler); *Grider v. Compaq Computer Corp.*, No. CJ-2003-969, 2004 WL 5264946 (Okla. Dist. Oct. 26, 2004) (following *Ysbrand* and applying Texas law to breach of warranty claims in a putative nationwide class action against a Texas corporation, despite a ruling from the Texas Supreme Court that Texas law did not apply and that the class could not be certified under Texas law); *Cuesta v. Ford Motor Co., et al.*, 209 P.3d 278, 285 (Okla. 2009) (confirming that the *per se* "single principal place of

business" rule of *Ysbrand* "is the law in Oklahoma as to UCC warranty claims").

In short, through *Ysbrand* and its progeny (including the case below), the Oklahoma courts have abandoned any pretense of conducting the constitutionally required individualized inquiry into the connection between a specific state, the claims of each class member, and a specific defendant. Instead, the Oklahoma courts have attempted to circumvent *Shutts* and the Constitution and to justify their *per se* rule with reference to Oklahoma choice-of-law principles.

Specifically, Oklahoma purports to base its choice-of-law rules on the Restatement (Second) of Conflicts, which, according to the Oklahoma Supreme Court, promotes a "most significant relationship" test as a means to "determine[] which state's law is most directly connected to the parties and the transaction." *Ysbrand*, 81 P.3d at 625. Beginning with *Ysbrand*, however, the Oklahoma Supreme Court has applied this "most significant relationship" test to the putative class *as a whole* (and, in the case below, to the defendants *as a group*), rather than to the particular claims of the individual class members and to each defendant. *Id.* In an effort to justify this collective approach in *Ysbrand*, the Oklahoma Supreme Court cited general policy factors from the Restatement and held that "[t]he needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions." *Id.* at 626.

Under *Shutts* and its progeny, however, no state may subordinate due process requirements to its desire for uniformity of result, perceived efficiency, or

even compliance with that state's choice-of-law rules. None of these interests provides a sufficient basis for overcoming the Constitution's prohibition against applying a state's law to conduct or claims that have "little or no relationship" to that state. *See Shutts*, 472 U.S. at 821; *see also Allstate Ins. Co.*, 449 U.S. at 326 (finding that a "State's interest in the efficient operation of its judicial system is clearly not sufficient . . . to justify the application of a rule of law that is fundamentally unfair to one of the litigants") (Stevens, J., concurring).

Oklahoma is free to follow the Restatement for its choice-of-law analysis, but it must do so in strict compliance with the due process limitations that this Court has explicitly imposed on the choice of governing law in nationwide class actions, including an individualized choice-of-law inquiry that ignores the purported existence of a class. By disregarding this constitutionally mandated inquiry and imposing a *per se* "principal place of business" rule on class actions in Oklahoma, including the case below, the Oklahoma Supreme Court is violating the Due Process rights of litigants in its state courts.

II. BY APPLYING MICHIGAN LAW TO THE CLASS CLAIMS AGAINST WCI, THE OKLAHOMA SUPREME COURT IS VIOLATING WCI'S DUE PROCESS RIGHTS, BECAUSE WCI HAS NO RELEVANT CONTACTS WITH MICHIGAN IN THIS CASE.

In the case below, the Oklahoma Supreme Court was called upon to assess choice-of-law principles in a putative nationwide class action involving two separate defendants (Ford and WCI), with three different principal places of business (Michigan as to Ford, Oregon as to WCI, and Florida as to the Former

Subsidiaries). 209 P.3d at 283; App. D 80a. The Court was unmoved by the distinction. After quoting extensively from its analysis in *Ysbrand*, the Court readily applied Michigan law to Ford. *Id.* at 283-284; App. D 78a – 83a. Then, citing what it represented to be underlying "facts" in the case, the Oklahoma Supreme Court enumerated three purported "significant contacts" between WCI and Michigan that justified the Court's application of Michigan law to WCI: (1) a contract with Ford in Michigan; (2) service as a pedal supplier "for trucks manufactured by Ford;" and (3) the use of engineering specifications that "emanated from Ford's engineers in Michigan." *Id.* at 283; App. D 81a. The Court then concluded by asserting that "in light of the nature and extent of Williams' contacts with Ford in Michigan, we find Michigan has a 'significant aggregation of contacts' such that the application of Michigan law to the breach of warranty claims is 'neither arbitrary nor fundamentally unfair' and thus, constitutional." *Id.* at 285 (citing *Ysbrand*, 81 P.3d at 626, and *Shutts*, 472 U.S. at 818); App. D 83a.

That effort falls well short of constitutional requirements and contravenes traditional choice-of-law analysis. First, contrary to the explicit directives of *Shutts*, neither the District Court nor the Oklahoma Supreme Court individually analyzed the possible connection among the affected jurisdictions, each defendant, and the class members' claims against each defendant. And there was nothing to prevent either court from doing so as to WCI, because it is undisputed that (1) the putative class members reside in 51 U.S. jurisdictions; (2) WCI is a Delaware corporation with its principal place of business in Oregon; (3) the Former Subsidiaries were Florida corporations who developed, designed, tested, and built the

pedal assemblies in Florida, then sold them to Ford truck plants in Kentucky and Mexico; and (4) the class claims against WCI were for breach of express and implied warranty, strict products liability, and negligence. Ford and WCI even provided the Oklahoma courts with extensive analyses of the warranty and tort laws of the 51 jurisdictions at issue.[6] In short, the Oklahoma courts had all of the information necessary to conduct a constitutionally valid choice-of-law analysis below. They just chose not to do it.

Second, relying on *Ysbrand*, both the District Court and the Oklahoma Supreme Court *presumed* the existence of a valid, nationwide class, then purported to evaluate the significance of contacts between that class *as a whole* and the one state (Michigan) whose law the Oklahoma Supreme Court had applied in *Ysbrand*. Given this tendentious construct, and the force of *Ysbrand*, the Supreme Court's choice-of-law conclusion was inevitable, because the Court had already reached this conclusion in *Ysbrand*.

Third, after confirming the *per se* rule of *Ysbrand,* the Oklahoma Supreme Court then engaged in some *ex post facto* rationalization in order to bootstrap WCI into the mix. 209 P.3d at 283-84; App. D 78a – 83a.

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[6] The District Court, without explanation, simply disregarded the defendants' extensive analyses of the 51 jurisdictions at issue and relied, instead, on a simplistic chart that plaintiffs had prepared with regard to only four of those jurisdictions. The chart did nothing more than set forth state UCC breach of warranty language and the elements of the two tort claims. The chart lacked any *analysis* of how each of the four states actually applied its laws in practice, including legal standards of "defect," the economic loss doctrine, notice and privity requirements in warranty claims, and the like.

But there was no choice-of-law analysis as to WCI individually, almost as though WCI were merely an appendage of Ford.[7]

Fourth, the undisputed facts, which the District Court and the Oklahoma Supreme Court simply ignored, show that there is no connection between WCI, the individual class members' claims against it, and the state of Michigan. Although WCI does not dispute that its Former Subsidiaries had contact with Ford in Michigan, the class members' claims do not arise from, or in any way implicate, that contact. Rather, the class warranty claims against WCI are for alleged defects in design and/or manufacturing, and the uncontroverted evidence shows that

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[7] Ironically, for all of the Oklahoma Supreme Court's effort to impose Michigan law on WCI, Michigan courts have neither followed the *Ysbrand per se* rule nor shown any of the "intensity of interest" that Oklahoma claims Michigan has in applying its law to "home state" industry. *See, e.g., Drooger v. Carlisle Tire & Wheel Co.*, No. 1:05-CV-73, 2006 WL 1008719, at *9 (W.D. Mich. April 18, 2006) (citing *Ysbrand*, yet refusing to certify a breach of warranty class action or to apply the law of the defendant manufacturer's principal place of business); *Bowers v. Jefferson Pilot Fin. Ins. Co.*, 219 F.R.D. 587, 582 (E.D. Mich. 2004) (refusing to apply Michigan law to all claims); *Rosen v. Chrysler Corp.*, No. 97-CV-60374-AA, 2000 WL 34609135, at *12 (E.D. Mich. July 18, 2000) (refusing, on due process grounds, to apply Michigan law to all claims in a class action proceeding under the Michigan Consumer Protection Act); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 223 (W.D. Mich. 1998) (refusing to apply forum law uniformly to all claims) (citing *Shutts*, 472 U.S. at 821-22).

WCI's alleged conduct relevant to the defect claim – design, manufacture, and sale – occurred outside of Michigan.[8]

Fifth, the Oklahoma Supreme Court's assertions regarding WCI's "contacts" with Michigan (209 P.3d at 284; App. D 81a) are without any basis in the record. But even if the assertions were true, they are irrelevant to a choice-of-law analysis, because not a single one of those alleged contacts bears on the *class claims against WCI*, which concern allegedly defective pedals, not WCI's alleged contractual relationship with Ford (or even the "Michigan specifications" with which plaintiffs allege WCI did not comply).

In sum, *Shutts* specifically forbids what the Oklahoma Supreme Court did to WCI here: forego an individualized inquiry; presume the existence of a class; lump WCI in with Ford after the fact; ignore the actual class claims against WCI; and focus on

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[8] If one were to focus not on the locus of the allegedly defective design and manufacture (Florida), but on the locus of the alleged breach of warranty, the unconstitutionality of the Oklahoma Supreme Court's holding becomes even clearer. As a general matter, in states that allow claims for "unmanifested" defect, the "breach" would have occurred when the Former Subsidiaries sold the "defective" pedals to Ford in Florida (for installation in trucks in Kentucky and Mexico). In states that require manifestation, the "breach" would occur upon manifestation in any or all 51 jurisdictions. In no possible scenario does Michigan have "more significant contacts" or a greater "intensity of interest" than any other jurisdiction in the dispute between WCI and the class members over an alleged breach of warranty. And the conflict of laws as between these two types of jurisdictions precludes the use of only one state's law to determine the "breach" issue, much less any finding of "common questions of law" in this putative nationwide class action.

WCI's alleged contacts with *Ford* and not with the class members.

III. BY SUBJECTING CLASS ACTION DEFENDANTS TO LIABILITY UNDER ONE STATE'S LAW THAT THEY WOULD NOT SUFFER UNDER THE LAWS OF OTHER STATES, THE OKLAHOMA SUPREME COURT IS VIOLATING DEFENDANTS' RIGHTS UNDER THE FULL FAITH AND CREDIT AND DUE PROCESS CLAUSES.

A. Full Faith And Credit And Due Process Require A Detailed Conflict-Of-Laws Analysis And Forbid The Use Of One State's Law To Regulate Conduct In Another State With Conflicting Law.

The Full Faith and Credit and Due Process Clauses impose overlapping constitutional standards with which a forum state must comply in employing its choice-of-law analysis. The Full Faith and Credit Clause "sets certain minimum requirements which each state must observe when asked to apply the law of a sister state." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953). "Full Faith and Credit does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504-505 (1939). *See also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) (finding that a "proper adjudication of conduct that occurred outside [the forum state] to other persons would require their inclusion

[in the case and the application of] the laws of their relevant jurisdiction"); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996) (stating that "no single state" can "impose its own policy choice on neighboring states"). Likewise, the Due Process Clause precludes the application of one state's law to a claim absent a cognizable state interest in that claim, which is lacking where the parties and the dispute have no connection to that state. *Shutts*, 472 U.S. at 818-19.

In order to comply with these complementary constitutional standards, a court seeking to apply state law to conduct occurring outside of that state must perform an in-depth conflict-of-laws inquiry in order to identify and evaluate any material conflicts between the law it seeks to apply and the laws of other interested jurisdictions. *Shutts*, 472 U.S. at 816-18. Especially in a nationwide class action, where the court may seek to apply the laws of one or more states to class members in 51 separate jurisdictions, the conflicts analysis must be "thoroughgoing," in order to ensure the correct application of a state's substantive law to claims of tremendous financial consequence to the defendants. *Id.* at 818. If material conflicts exist, one state's law cannot be applied to regulate conduct in those jurisdictions where the conflicts exist. *Pacific Employers Ins. Co.*, 306 U.S. at 504-05; *Gore*, 517 U.S. at 571.

B. The Oklahoma Courts Failed To Conduct The Constitutionally Required Conflicts Analysis In This Case.

As noted above, neither the District Court nor the Oklahoma Supreme Court conducted a proper conflict-of-laws analysis before applying Michigan law to a 51-jurisdiction class action, because, as far as those

courts were concerned, *Ysbrand* was dispositive of the issue. *See supra* at 5, 8. In an effort to preempt any constitutional examination of this *per se* rule, however, both courts purported to assess conflicts between the laws of Michigan, on the one hand, and Florida and Oregon, on the other. As the Oklahoma Supreme Court stated it, the District Court had concluded that the application of Michigan law to the entire class "was feasible because the laws were similar in the areas of negligence, strict products liability and breach of warranty in those three states." 209 P.3d at 284. In a concluding footnote, the Court also asserted that "the UCC warranty laws in Michigan are similar to those of Oregon and Florida." *Id.* at 285.

It is undisputed, however, that neither Oklahoma court undertook a detailed analysis of the law of each state where class members reside. Instead, the District Court ignored the defendants' extensive state law conflicts submissions and, on the basis of a superficial four-state chart that the plaintiffs provided,[9] rationalized its application of Michigan law under the *per se* rule set down in *Ysbrand*. Paying lip service to a constitutionally mandated conflict-of-laws analysis does not comport with the Full Faith and Credit Clause or with the Due Process Clause. By failing to conduct the required analysis, the Okla-

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[9] As the District Court stated it: "As shown on tables provided by Plaintiffs, the law governing these claims does not materially vary as between Michigan, Florida, Oregon or other states with arguable connections to the parties, their claims or the controversy." App. A 31a. Inexplicably, the District Court completely ignored the extensive, detailed analyses that Ford and WCI had prepared. And as to the quality and validity of plaintiffs' tables, *see supra* n.6.

homa courts were able to pretend that no relevant conflicts existed, which justified the application of a single state's law to a putative class of over 500,000 members. This stratagem violated the parties' constitutional right to an individualized conflict-of-laws analysis.

C. A Proper Conflict-Of-Laws Analysis Establishes That Michigan Law Cannot Constitutionally Apply To All Class Members And To Both Defendants.

1. *The Laws Of The Relevant Jurisdictions Are In Conflict.*

If the Oklahoma courts had conducted the constitutionally required conflicts analysis, they would have found exactly what the defendants presented to the District Court in their detailed "Appendix of Variations in State Law": Class members reside in 51 jurisdictions, and the laws of those jurisdictions conflict on the elements and nuances of the class claims against Ford and WCI.

For example, both the Oklahoma courts and plaintiffs assert that under Michigan law, all class members can recover damages for "unmanifested defects." *See Cuesta*, 209 P.3d at 286. That is to say, class members may receive money damages, even though they have never had any problem with their accelerator pedals. This provision of Michigan law is absolutely critical in a case where the undisputed evidence shows that over 99% of the class members never experienced any warranty problem even *arguably* related to the purported product defect. It is also critical, because the prevailing law among the states is that a plaintiff *cannot* recover for "unmanifested" defects, on the ground that the plaintiff has

suffered no legally cognizable injury. *See, e.g., Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (affirming dismissal of a putative class action and holding that where a product performs satisfactorily and never exhibits an alleged defect, plaintiff has no cause of action); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 601 (S.D.N.Y. 1982) (denying class certification where "the great majority" of the tires at issue "remained failure free throughout the time they were used," thus depriving those class members of a viable warranty claim).[10]

Likewise, the states affected by the proposed class differ in their definitions of what constitutes a product "defect" (which implicates two of the four "common questions of fact" the District Court found, "defect" and "unreasonable danger") and in the elements of a breach of warranty claim (on issues such as notice, reliance, and privity). Defendants provided all of this information to the District Court, yet both that court and the Oklahoma Supreme Court ignored the submissions and the substantial differences in the laws of the 51 jurisdictions at issue.

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[10] *See also In re General Motors Type III Door Latch Litig.*, No. 98 C 5836, 2001 WL 103434, at *3-5 (N.D. Ill. Jan. 31, 2001); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455 (D.N.J. 1998); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805 (E.D. La. 1998); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997); *Lee v. General Motors Corp.*, 950 F. Supp. 170, 171-74 (S.D. Miss. 1996); *Barbarin v. General Motors Corp.*, Civil Action No. 84-0888, 1993 WL 765821, at *2-3 (D.D.C. Sept. 22, 1993); *Yost v. General Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 1998); *Verb v. Motorola, Inc.*, 672 N.E.2d 1287, 1295 (Ill. 1996); *Am. Suzuki Motor Corp. v. Superior Court*, 44 Cal. Rptr. 2d 526, 531 (Cal. Ct. App. 1995).

Even if one were to adopt the Oklahoma courts' constitutionally infirm focus on those four states with the purportedly "most significant interest" in the dispute – Michigan, Florida, Oregon, and Kentucky – the result would be no different, because the laws of these states differ on issues key to the class claims, including the definition of product defect (which plaintiffs must prove as a "common question" for their breach of warranty claims),[11] the warranty notice requirement,[12] and privity of contract for warranty purposes.[13]

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[11] Kentucky focuses on the manufacturer's conduct in determining defect. *See, e.g., Tobin v. Astra Pharma. Prod., Inc.*, 993 F.2d 528, 536 (6th Cir. 1993). Oregon assesses "defect" and "unreasonable danger" according to the "consumer expectations" test contained in the RESTATEMENT (SECOND) OF TORTS, §402A, cmt. g (1965). *See* OR. REV. STAT. §30.920(1) (2009); *McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 330 (Or. 2001). Likewise, Florida focuses on whether a product's failure "frustrated" the ordinary consumer's expectations. *See, e.g., Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1144-45 (Fla. Dist. Ct. App. 1981). Michigan asks whether the product was "reasonably fit" for its intended purpose. *See, e.g., Hartford Fire Ins. Co. v. Walter Kidde & Co., Inc.*, 328 N.W.2d 29, 33 (Mich. Ct. App. 1982).

[12] Florida, Oregon, and Michigan all require such notice, while Kentucky does not. *See Mullins v. Wyatt*, 887 S.W.2d 356, 357-58 (Ky. 1994).

[13] Both Kentucky and Florida require privity between the parties where liability is predicated on warranty. *See, e.g., Snawder v. Cohen*, 749 F. Supp. 1473, 1481 (W.D. Ky. 1990); *T.W.M. v. Am. Med. Sys.*, 886 F. Supp. 842, 844 (N.D. Fla. 1995). Oregon law distinguishes between consumers and business purchasers, as Oregon has abolished the privity requirement for personal goods. *See* OR. REV. STAT. § 72.8020 (2009); *Clark v. Ford Motor Co.*, 612 P.2d 316, 319 n.8 (Or. Ct. App. 1980). Michigan law is unsettled on this issue; existing authority conflicts as to whether privity is required for a consumer to maintain an action for breach of warranty against a remote

2. *The Conflicts Are Real And Preclude The Application Of One State's Law To This Case.*

The foregoing differences in state law do not relate merely to inconsequential issues that would render them "false conflicts." *See Shutts*, 472 U.S. at 818. Rather, they speak directly to the ability of a given class member to maintain a breach of warranty claim against each defendant, especially WCI, which has no relevant connection to Michigan, the state whose law a single Oklahoma state court wants to apply to over 500,000 people spread all over the country.

In short, Oklahoma's application of Michigan warranty law may expose WCI to liability to class members who could not assert these claims in their home states, such as those who reside in states that do not allow damages for unmanifested defects or that require vertical privity in order to recover from a remote supplier under a warranty theory. Such an outcome is at once arbitrary and unfair, contrary to the Due Process Clause and to the Full Faith and Credit Clause. *See Shutts*, 472 U.S. at 822 (holding that a state may not, through the application of its laws, "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them") (*citing Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 502 (1939), and *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)). *Cf. Gore*, 517 U.S. 559, 573 n.19; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (holding that a state court jury may not punish a

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manufacturer. *See Heritage Res., Inc. v. Caterpillar Fin. Serv. Corp., et al.*, __ N.W.2d __, No. 03-001720-CK, 2009 WL 1885919 (Mich. Ct. App. June 30, 2009).

defendant for conduct that was lawful in jurisdictions outside of that state).

In sum, Oklahoma cannot apply Michigan law to punish WCI for conduct occurring outside of Michigan that is not unlawful in those other jurisdictions. Likewise, Oklahoma cannot use Michigan law to expand the rights of non-Michigan class members, in derogation of the prerogative of those members' state legislatures to protect or to limit those rights. *Cf. Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (holding that under our constitutional system, "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation"). Because the Oklahoma Supreme Court engaged in both proscribed activities – expansion of WCI's liability and of certain class members' rights – its opinion should be overturned.

IV. THE ISSUES RAISED BY THIS PETITION ARE IMPORTANT AND RECURRING.

The questions presented in this petition resonate far beyond the parties to the Oklahoma litigation. Ever since *Ysbrand*, Oklahoma has imposed a *per se* rule that applies a single state's law in every nationwide breach of warranty class action. In this case, the Oklahoma courts pressed that rule to its illogical extreme by applying Michigan law to one defendant (WCI), simply because Michigan is the principal place of business of *another* defendant (Ford). As interstate and international commerce continue to grow, the deleterious effects of the Oklahoma *per se* rule will grow in scope and consequence.

Class action and tort reform in this country will exacerbate those consequences, because they create an even greater incentive for plaintiffs' lawyers to file "no injury" class actions in jurisdictions, like Okla-

homa, where favorable choice-of-law principles will expose defendants to much greater liability under the substantive laws of plaintiff-friendly states. With the double-edged threat of favorable substantive law and a preordained class certification, plaintiffs' lawyers can exert extreme settlement leverage on defendants that have no relevant connection to the jurisdiction whose law is applied. And this state of affairs does not merely expose defendants to liability for conduct unrelated to the state whose law is applied. It also undermines the efforts of those states that have enacted responsible tort reform (as well as the effort of Congress, through CAFA) to halt abusive class action practices at the state court level.

This is precisely the scenario that unfolded here. Tort reform and a responsible Supreme Court in Texas forced some Texas plaintiffs' lawyers to seek greener pastures in a jurisdiction that, post-*Ysbrand*, virtually guaranteed a certified class and the application of a single state's favorable substantive law. Having been relieved of their obligation to satisfy constitutional choice-of-law and conflict-of-laws standards in Oklahoma, plaintiffs' lawyers effectively parlayed "no injury" tort claims into a massive, certified, breach of warranty class. And they are not alone. The current Oklahoma regime has thrown open the gates to all manner of class action filings and has put Oklahoma state courts in a position to dictate the law that will apply to millions of persons who have no connection to the state or to the state whose law the Oklahoma courts may apply in any given class action. The end result: the type of forum shopping that this Court, other state courts, and commentators have long condemned. *See supra* at 12-13.

Unless this Court intervenes, states like Oklahoma that employ constitutionally deficient choice-of-law rules will continue to serve as magnets for putative nationwide class actions. The results – including the usurpation of other states' procedural and substantive laws, the adjudication of rights as to parties who have no connection to Oklahoma or to the state whose law is applied, and the imposition on defendants of liability for conduct that is not culpable where it occurred – are of significant moment to millions of Americans. By requiring adherence to traditional choice-of-law inquiries and enforcing constitutional standards on the courts of Oklahoma (and those of kindred spirit), this Court can restore order and equity to class action determinations in the United States.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY D. NELLIS
MARTHANDA J. BECKWORTH
ATKINSON HASKINS, NELLIS, BRITTINGHAM, GLADD & CARWILE, P.C.
1500 ParkCentre,
525 South Main
Tulsa, Oklahoma 74103
(918) 582-8877

KURT STITCHER
Counsel of Record
DAVID W. PORTEOUS
ELIZABETH B. VANDESTEEG
LEVENFELD PEARLSTEIN, LLC
2 North LaSalle Street,
Suite 1300
Chicago, Illinois 60602
(312) 476-7597

Counsel for Petitioner

July 20, 2009

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF BRYAN COUNTY
STATE OF OKLAHOMA

[Filed MAR. 1, 2007]

No. CJ-2004-511

BRAULIO M. CUESTA and ERIC L. GOLDEN,
Individually and on behalf of all others
similarly situated
Plaintiffs,

vs.

FORD MOTOR COMPANY and
WILLIAMS CONTROLS, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION

This cause is before the Court on the Motion for Class Certification of Plaintiffs Braulio M. Cuesta and Eric L. Golden. Defendants in this action are Ford Motor Company ("Ford") and Williams Controls, Inc. ("WCI"). This Court has reviewed and considered all of the pleadings in this matter, the parties' respective briefs, the documents, exhibits, presentations, admissions, arguments, and evidence provided at the class certification hearing on September 7, 2006. Additionally, this Court considered the parties' post-hearing submissions. Further, the Court has considered the relevant legal authority as it relates to this matter. Both counsel for Plaintiffs and Defendants have provided the Court with proposed orders, as

agreed at the September 7th hearing. Based on the foregoing, the Court GRANTS Plaintiffs' motion, as set out in the following Factual Review and Conclusions of Law.

Factual Review

I. The Court's Limited Review of Facts Related to Class Issues

Class certifications in Oklahoma are governed by OKLA. STAT. tit. 12, § 2023. Before analyzing the requirements of section 2023, it is necessary for the Court to analyze the factual background upon which the Plaintiffs' lawsuit rests. In doing so, however, the Court is cognizant of its role at this stage of the proceedings. The United States Supreme Court has stated:

> *[N]othing* . . . gives a court *any authority* to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule. . . .

Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974) (emphasis added).

The Court has endeavored to carefully balance its obligation to conduct a full and complete review of the class issues with the Supreme Court's admonitions that "pre-trial hearings are to be carefully limited" and that "the trial court's guess as to which party would prevail at trial should have no bearing on the allowance or disallowance of a proposed class action." *Eisen*, 417 U.S. at 177. Consequently, like the numerous Courts which have followed *Eisen's*

holding,[1] this Court, while conducting a review of the parties' legal arguments and proposed proof in connection with the class determination, declines to undertake an examination of the merits of the claims and defenses. What follows is a description of Plaintiffs' allegations in this litigation.[2]

II. Plaintiffs' claims

Plaintiffs seek to represent the following class:

> All entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who purchased or who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one Ford truck or Ford Excursion, including, but not limited, to model years 2001.25, 2002, 2003, and 2003.25 which was marketed or manufactured by defendant Ford for sale in any of the

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[1] *See Eggleston v. Chicago Journeyman Plumbers*, 657 F2d 890, 895 (7th Cir. 1981) (citing *Eisen*, 417 U.S. at 177), *cert. denied*, 455 U.S. 1017 (1982); *Harris v. General Develop. Corp.*, 127 F.R.D. 655, 658 (N.D. Ill. 1989) ("For the purpose of ruling on plaintiffs' motion for class certification, plaintiffs' allegations are taken as true and the court may not make an inquiry into the merits of the lawsuit.").

[2] The Court believes that, while it cannot and should not resolve merits issues, it is important to understand the Plaintiffs' claims. The Plaintiffs have presented to the Court an outline of their evidence and claims against the Defendants, and in many instances, have gone further by presenting evidence supporting their allegations. Regardless, the Court is providing this review to illustrate the nature of the claims—not because the Court has concluded that the Plaintiffs' position is correct. Suffice it to say that the Defendants vigorously contest the vast majority of the factual claims made by the Plaintiffs.

> fifty states of the United States of America or the District of Columbia, and which contains a non-adjustable, fixed electronic throttle control ("ETC") accelerator pedal manufactured by Williams Controls, Inc., excluding entities or persons having claims for personal injuries, death or property damage, other than claims for diminution in the value of the trucks or Excursions.[3]

Plaintiffs seek to certify a national class action against Defendants Ford and WCI for the purpose of litigating all existing defect-related claims involving the subject ETCs or accelerator pedals in one forum and proceeding.

Defendant Ford manufacturers a line of pickup trucks called "Super Duties" as well as an SUV called the "Excursion." The model years of these vehicles that are the subject of this litigation include 2001.25, 2002, 2003, and 2003.25, all of which had installed a fixed (non-adjustable) accelerator pedal that was manufactured and supplied by Defendant WCI. The named Plaintiffs, Braulio M. Cuesta and Eric L Golden, have asserted claims for breach of express warranty, breach of implied warranty of merchantability and breach of implied warranty of fitness, all as provided by the Uniform Commercial Code, strict products liability, and negligence against Defendants Ford and WCI in the form of a class action.

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[3] The class also excludes Defendants and their subsidiaries, affiliates, dealers, officers, directors, any entities in which Defendants have a controlling interest, the immediate families of any aforementioned individuals, all currently serving justices, judges and magistrate judges of U.S. Courts or Oklahoma Courts, the spouses of such justices, judges and magistrate judges, and all persons within the third degree of relationship to such justices, judges, magistrate judges or their spouses.

Plaintiff Cuesta owns a 2001 Ford F350 Super Duty truck, and Plaintiff Golden owns a 2002 Ford F450 Super Duty truck. At the time of their manufacture and purchase, it is undisputed that both vehicles were equipped with fixed accelerator pedals manufactured and supplied by Defendant WCI. Plaintiffs allege that when they forcefully press down on their accelerator pedals to achieve maximum acceleration with forces the pedals are supposed to tolerate by design, their trucks do the exact opposite and go to idle rather than accelerate. When this happens, Plaintiffs allege that they must release and repress their pedal in order to accelerate. Plaintiff Cuesta alleged that he has experienced this "going to idle" defect over 100 times and recalled one specific occasion where he narrowly avoided a head-on collision with oncoming traffic while attempting to pass another vehicle because of his vehicle "going to idle" rather than accelerating. Plaintiff Golden alleged that he has experienced the "going to idle" defect on two different occasions. Plaintiff Cuesta alleged that he brought his truck to Ford service stations on multiple occasions complaining that it did not accelerate properly, but the pedal was never fixed or replaced by Ford. After filing this lawsuit and under the supervision of the Defendants, Plaintiff Cuesta had his original pedal removed and replaced it with a new pedal.[4]

Plaintiffs base their claims on the grounds that the fixed accelerator pedals in their trucks are defective in design and/or manufacture because when depressed with forces they are supposedly designed to

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[4] Plaintiff Cuesta's original pedal has been tested by the parties and is being preserved for evidentiary purposes. Plaintiff Golden's Ford F450 contains its original accelerator pedal.

withstand, they fail and go to idle rather than accelerate as intended by the driver. Plaintiffs assert that these accelerator pedals render Ford's Super Duty trucks and Excursions unreasonably dangerous for driving on public roads and highways as they will not respond to the driver's commands for maximum acceleration, and thus pose a risk of serious injury or death to the drivers of these vehicles and their passengers, other drivers and passengers, and pedestrians. As support for their claims, Plaintiffs have presented substantial evidence alleging that these pedals have failed Ford's own specifications designed to ensure that the pedals are robust enough to withstand the forces at issue.

Ford developed pedal "engineering specifications" that set forth the design, performance, and testing requirements that it demanded the accelerator pedals at issue satisfy before being installed in vehicles that were made available to the public. These engineering specifications contained a battery of performance tests, one of which was the "Overload Test," which required that ten representative sample accelerator pedals be able to, at a minimum, withstand repeated loads (or pushing force from the driver's foot) of 135 pounds and a single load of 200 pounds while staying within Ford's specified voltage parameters and not breaking, malfunctioning, or failing to respond during and after the forces were applied. Apparently, these thresholds were intended to simulate forces that the pedal would encounter over its lifespan.

Ford required a 100% "Pass Rate" for all ten of the test pedals subjected to the Overload Test. If any single test pedal failed any portion of the Overload Test, Ford would deem it a failure for the entire pedal design and the pedal would have to be re-designed. In

July 2000, WCI conducted the "Overload Test" on the first pedal design at issue, the "BA" pedal, and Ford engineers were present during those tests. It is alleged that all 10 of the test BA pedals failed portions of the Overload Test as they generated out-of-range voltages during and after being subjected to overload forces, resulting in a 100% failure rate for the BA pedal design. It is further alleged that despite the test results and data, the test summaries drafted by WCI indicate that the pedals all passed the Overload Tests.

It is clear that from the Fall of 2000 through the late Summer of 2002, approximately 380,000 BA pedals of the same design that had failed the Overload Test in July 2000 were manufactured by WCI, installed in Ford's Super Duty trucks and Excursions, and sold to Ford customers.

Plaintiffs presented evidence that this "going to idle" defect was not merely theoretical, but that Ford customers were experiencing it in their daily lives. Ford's early warranty data from a two-month time frame in the spring of 2001 reveals that numerous Ford customers were complaining that their trucks were idling rather than accelerating when they pressed down on their accelerator pedals. Ford's own documents reveal that in the fall of 2001, while investigating the complaints of a Mississippi customer who continued to experience the "going to idle" defect even after twice replacing his pedal, Ford's service representatives admitted to encountering the identical "going to idle" problem in other vehicles in the field. By early 2002, a Ford employee who owned a Super Duty truck alerted Ford engineers that he was experiencing the "going to idle" defect when he forcefully accelerated, and continued to experience it

even after replacing his original pedal with another BA pedal.[5] WCI tested these malfunctioning BA pedals and confirmed that they failed to meet Ford's overload requirements set forth in Ford's engineering specifications.

In the late spring or the early summer of 2002, Ford and WCI were in the process of developing the next generation of WCI fixed accelerator pedals to be installed in Ford's Super Duty trucks and Excursions in the fall of 2002 (model year 2003.25). It is alleged that the next generation pedal carried over the identical physical parts from the BA pedal, including the same pedal bracket that affixes the pedal to the floor of the vehicle. It is also alleged that during the development of the new pedal, Ford and WCI became aware that it also failed (just like the BA pedal) Ford's overload requirements (set forth in its engineering specifications). On hard accelerations, the voltage would go out-of-range.

By the summer of 2002, Ford's pedal engineer responsible for the pedals at issue began investigating the "going to idle" problem. Ford requested that WCI pull ten BA pedals off the production line and test their overload capacity. Ford admits that a number of these pedals failed at forces far below the 135 and 200-pound thresholds set forth in Ford's engineering specifications. Ford then conducted its own tests on several BA pedals and confirmed that they did not satisfy Ford's overload requirements. When Ford inquired of WCI as to how the BA pedal had "passed"

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[5] In referring to the "going to idle" defect, this Ford employee stated in an internal Ford email to a Ford engineer, "this is a condition that I would think we probably don't want to exist in the field."

the Overload Test in July 2000, WCI claimed that it had misinterpreted Ford's engineering specifications and never measured the pedals' voltage while overload forces were applied, as required by the engineering specifications. WCI, however, produced the actual test data in this litigation, which revealed that WCI had conducted the Overload Test properly in July 2000, and the BA pedals had a 100% failure rate.

Ford's representatives have repeatedly admitted that the BA pedals were not made to Ford's engineering specifications with respect to overload. Ford has made the identical representation to the National Highway Traffic Safety Administration ("NHTSA") in writing, and the NHTSA's independent testing of the BA pedal revealed that it failed at forces below the thresholds set forth in Ford's engineering specifications. It is alleged, however, that neither Ford nor WCI have ever informed the public of this fact.

It is undisputed that in the fall of 2002, Ford made a design change to the BA pedal and the next generation pedal to make them more robust so that they would satisfy Ford's overload requirements. The design change resulted in a name change of the first pedal from "BA" to "BB". This newly designed BB pedal was installed on 2003 model Super Duties and Excursions for only several months because Ford then switched to using its new generation pedal in the fall of 2002. The new generation pedal that also received the forked-lever arm design, ultimately called the "AC" pedal, was installed on 2003.25 model Super Duties and Excursions beginning in late 2002.

It is alleged that in January 2003, Ford's pedal engineers discovered that the new AC pedal, despite the design change, still failed to meet Ford's overload requirements in the engineering specifications (even

though the requirements were apparently less demanding), and, like the BA pedals, generated out-of-range voltages when pressed with overload forces. Ford again required WCI to test AC pedals pulled off the production line and confirmed that they failed to meet Ford's overload specifications. In analyzing the overload failures, Ford's engineers discovered that a design gap existed behind the pedal bracket of the AC pedals, which they believed allowed the pedal to bend under overload forces and resulted in the pedal generating out-of-range voltages. Ford had WCI run tests on the AC pedals simulating the bracket gap, and the tests reflected that Ford's theory was accurate. Ford's engineers also confirmed that this gap behind the bracket existed in the CAD designs of the BA and BB pedals as well, and testified that the gap should not have been included in any of the designs. Ford's pedal engineer also testified that the identical bracket was used on the BA, BB, and AC pedals.

In response to the bracket gap, Ford's pedal engineer in early 2003 instituted a second universal design change that eliminated the gap by elongating the bracket to ensure that the pedal contacted the vehicle's floor. This second design change was made for the brackets on all AC pedals going forward as well as for the service parts for the BA and BB pedals. This newest generation pedal with the corrected bracket was not put into effect until the Fall of 2003 for Ford's 2004 models. Consequently, the former bracket design with the gap was used for all pedals installed in the 2001.25, 2002, 2003, and 2003.25 Ford Super Duty trucks and Excursions.

After Plaintiffs filed this lawsuit, in November 2004, Ford alerted its dealers—at the NHTSA's request—that the WCI pedals may go to idle when

forcefully depressed, and if they encounter customers making such a warranty claim, they should replace the pedal. However, this Court is unaware of any notice having been disseminated to the public by the Defendants about the pedals' tendency to "go to idle".

Conclusions of Law

Because Oklahoma's class action rule closely resembles Federal Rule 23, Oklahoma courts look to federal authorities for guidance on class action issues. *E.g., Shores v. First City Bank Corp.*, 689 P.2d 299, 301 (Okla. 1984). The U.S. Supreme Court has noted that [c]lass actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). This is because class actions permit plaintiffs to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).

Subsections 1 through 4 of the Oklahoma class action rule, Section 2023.A, require (1) numerosity, *i.e.*, the class is so numerous that the joinder of all members is impracticable; (2) commonality, *i.e.*, there are questions of law or fact common to the class; and (3) typicality, *i.e.*, the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) representation, *i.e.*, the representative parties will fairly and adequately protect the interests of the parties. *Black Hawk Oil Co. v. Exxon*, 969 P.2d 337, 341 n.1, 343 (Okla. 1998). If the trial court determines that the four requirements of section 2023.A are met, then the court may certify a class if the plaintiffs' claims also meet the requirement "under § 2023.B.3 of *predominance, i.e.*, that

the questions of law or fact common to the class predominate[] over any questions affecting only individual class members, and that a class action [i]s superior to other methods of adjudicating the controversy." 969 P.2d at 343 (italics in original).

Class certification is a matter committed to the discretion of the trial court. *Ysbrand v. Daimler Chrysler Corp.*, 81 P.3d 618, 623 (Okla. 2003), *cert. denied*, 542 U.S. 937 (2004). In the face of a close question regarding certification, the pragmatically correct action is to sustain certification because, if it develops later during the course of the trial that the order is ill-advised, the order is always subject to modification. *Perry v. Meek*, 618 P.2d 934, 940 (Okla. 1980).

For the following reasons, the undersigned judge concludes that Plaintiffs' action satisfies all requisites for class certification under sections 2023A and 2023.B.3.

I. The four requirements of 2023.A.1 to 2023.A.4

A. Numerosity

This Court notes that Defendants Ford and WCI do not dispute that numerosity exists here. Even if Defendants had contested the numerosity requirement, this Court would find it satisfied.

"The numerosity test is satisfied by numbers alone when the size of the class is in the hundreds." *Black Hawk*, 969 P.2d at 343. Here, it is indisputable that thousands of class members exist. For example, Ford informed the NHTSA in its June 29, 2004 response to the investigation of the pedals at issue that there were at least 519,662 F Series Super Duty trucks and Excursions, model years 2001-2003, equipped with

fixed accelerator pedals manufactured by WCI. And in its filings opposing class certification, Ford claims that there are between 350,000 and 450,000 vehicles with the subject accelerators installed therein. *See* Ford's Opp'n to Plaintiffs' Motion for Class Certification at 11-12, and n.3.

Hundreds of vehicles equipped with the allegedly defective pedals would satisfy the numerosity requirement. Here, there exist hundreds of thousands of vehicles equipped with the pedals at issue. Section 2023A.1's numerosity requirement is plainly satisfied.

B. Common questions of law or fact

"The test for commonality is not demanding." *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001). Commonality "requires only a single issue common to the class." *JB. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999). *See also Perry v. Meek*, 618 P.2d 934, 938 (Okla. 1986) (same). Either a common question of law or a common question of fact will suffice for class certification; both are not required. *See, e.g., In re Universal Sew. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 666 (D. Kan. 2004). Moreover, commonality "has been construed permissively. All questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). That "the underlying facts fluctuate over the class period and vary as to individual claimants . . . does not defeat a class action, for Rule 23(a)(2) requires a showing of common issues of law or fact; it does not require identity of both facts and law." *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685, 691 (E.D. Pa. 1977).

In affirming the settlement of class actions against Chrysler arising from defective rear lift gate latches

that caused a variety of injuries, the court in *Hanlon* noted that a "common core of salient facts [even if] coupled with disparate legal remedies within the class" will suffice to show commonality. 150 F.3d at 1019. The *Hanlon* court reasoned:

> "Although members of the proposed class . . . may possess different avenues of redress, their claims stem from the same source: the allegedly defective designed rear lift gate latch installed in minivans manufactured by Chrysler between 1984 and 1995. Thus, the proposed class shares sufficient factual commonality to satisfy the minimal requirements of Rule 23(a)(2)."

Id. at 1019-20.

Plaintiffs here maintain that commonality exists because the claims of each class member stem from the allegedly defective and dangerous accelerator pedals installed in the Ford vehicles at issue, which are not made to Ford's engineering specifications, and consequently, when confronted with forces that they are supposed to be able to tolerate, fail and go to idle rather than accelerate. Plaintiffs have presented substantial, uncontroverted evidence that Ford made two design changes to all of the pedals in an effort to remedy the "going to idle" defect. First, Ford attempted to remedy the BA pedal design (as well as the next generation pedal) by adding a forked lever arm to all existing pedals manufactured by WCI with the goal of making the pedals more robust. But when that design modification proved insufficient, Ford then implemented a second universal design change aimed at eliminating the design gap behind all of the pedals at issue, which Ford engineers believed caused the "going to idle" defect. Plaintiffs presented evidence, in the form of Ford's documents and testimony

from a Ford engineer, that all of the subject accelerator pedals share an identical 2-3 millimeter gap behind the pedal bracket in their CAD (computer-aided design) drawings and also share the identical pedal bracket.

With this background, Plaintiffs claim that the following common questions of law and fact exist in this case: (1) whether the accelerator pedals at issue are defective; (2) whether the pedals are unreasonably dangerous; (3) whether the pedals reduce the value of the vehicles; and (4) whether the sale of the vehicles containing these pedals to members of the class constitutes a breach of any express or implied warranty by Defendants Ford and WCI?

Based on the facts noted above and the evidence adduced to date, this Court finds, as in *Hanlon*, that these questions of fact and law presented by Plaintiffs are common to the class as they stem from the allegedly defective accelerators manufactured by WCI that were installed in 2001.25, 2002, 2003 and 2003.25 Ford pickup trucks and Excursions with diesel engines. This Court notes that questions 1, 3, and 4 above are virtually identical to the common questions of fact and law identified by the United States Court of Appeals for the Sixth Circuit Court in *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552, 554 (6th Cir. 2006), wherein the Sixth Circuit upheld the certification of a class of Ford minivan owners with allegedly defective accelerator assemblies.

Defendants Ford and WCI make several arguments against commonality that the Court will now address. Defendants contend that commonality does not exist because there are three different pedal models implicated by Plaintiffs' claims the BA, BB, and AC designs—and the pedals are not identical: the BB and

AC pedals have the forked lever arm while the BA pedal does not, and the AC pedal has different electronics. Defendants claim that none of the pedals are similar enough to warrant being treated as a single class. In response, Plaintiffs argue that these differences are immaterial because each of the three pedal models suffer from the same alleged defect—they are not made to Ford's overload specifications and will fail and go to idle when confronted with heavier loads that they are supposed to be capable of withstanding. Plaintiffs also emphasize that the pedals all share the identical pedal bracket as well as the identical 2-3 mm gap in their design, which Plaintiffs allege, causes the accelerator pedals to malfunction. This Court also acknowledges that Defendant Ford presented evidence of its pedal engineer testifying that the bracket gap is vehicle-to-vehicle dependent, but as noted above, at this point in the proceedings the Court's role is not to declare a winner when faced with competing and contradictory evidentiary submissions. It is enough that Plaintiffs have not only alleged the existence of a defect, and have also introduced evidence supporting their claims.

This Court holds that the Plaintiffs have satisfied their burden of demonstrating commonality in this case. Even though the mechanism of the problem may not be identical, the Plaintiffs have presented sufficient evidence that all of the pedals suffer from the same malady, contain the same allegedly defectively designed bracket with a "gap" behind it, which Plaintiffs allege causes the pedals to fail under forceful applications, and that all of the 360,000+ BA pedals were constructed precisely like the production pedals that were tested by Ford and experienced a 100% failure rate on their overload test. Although Ford presented some evidence to the contrary with

respect to the gap being in all the vehicles, for certification purposes Plaintiffs need not conclusively prove that the pedals are identical in every respect or that they all contain the identical gap in every vehicle. Rather, Plaintiffs must simply present evidence to support their allegations and controvert Ford's evidence, which they have satisfactorily done. *See Daffin*, 458 F.3d at 554 (explaining, in approving the trial court's certification of the class, that if the plaintiff ultimately proves that the pedals at issue are identical, then the class will all have the same breach of warranty claim).

In this respect, this case significantly differs from *Caraway v. General Motors Corp.*, No. 102, 223, slip op. (Okla. Civ. App. Sept. 26, 2006), which Defendant Ford cites, where class certification was overturned because the plaintiffs there merely alleged that there was a class-wide defect, without evidentiary support, and the defendant presented uncontroverted evidence that the defect only existed in 5-10% of the vehicles in the purported class. *See Caraway*, slip op. at 5. This Court notes that Plaintiffs here have not merely alleged a common defect, but they have also presented evidence to support this claim. Defendants are free to contest whether the pedals suffer from the defect and whether the gap is present in all the vehicles, but those are defenses to merits issues that the Oklahoma Supreme Court has made clear this Court need not entertain as part of the class certification inquiry. *See Burgess v. Farmers Ins. Co.*, No. 99,739, 2006 WL 2673673 at *5-6 (Okla. Sept. 19, 2006).

With respect to Defendants' claims that the three pedals at issue are all different and therefore do not meet the commonality requirement for certification

purposes Court disagrees. As stated before; this Court finds that commonality is well-established by the fact that the three brake pedals were all manufactured or used by the Defendants, and that each pedal contains an identical potentially deadly problem. Therefore, based on the evidence developed by Plaintiffs to date, this Court finds it appropriate to address the three pedals in a single class. Additionally, this Court notes that if further discovery reveals that the BA, BB, and AC pedals are sufficiently different such that they should not be grouped together and treated as one in this litigation, this Court is free to create subclasses for each of these different pedals. *See Ysbrand*, 81 P.3d at 627.

Defendants also argue that commonality does not exist here because the class representatives have experienced the defect while the vast majority of the class members have not. Consequently, Defendants claim there is no common injury. This Court rejects this argument for several reasons. First, in affirming the class certification in *Ysbrand*, in which the neither the class representatives nor the class members had experienced the allegedly defective air bags, the Oklahoma Supreme Court confirmed that a defect need not manifest itself class-wide in order for a class to be certified. *See Ysbrand*, 81 P.3d at 621, 623 n.2. Second, the Court notes that Defendant Ford made this identical argument in the *Daffin* case, which the Sixth Circuit Court of Appeals rejected explaining that regardless of whether the throttle pedal defect has manifested itself, the class members and representatives have the same alleged defect and assert the same claim for diminution in value, and thus they suffer from the same economic injury. *See Daffin*, 458 F.3d at 553. This Court finds that the same reasoning applies here as Plaintiffs' have pre-

sented evidence that the class all suffers from the same defect in the pedals, and they have all asserted claims for the same economic loss, *i.e.*, the cost of replacing the defective pedals and/or the diminution in value of the vehicle.

In short, the operative facts giving rise to the claims against Ford and WCI are common to all Plaintiffs and class members. Discovery currently shows that the principal issues to be determined are whether the pedals installed in the Plaintiffs' and class members' vehicles are defective and unreasonably dangerous. The resolution of these issues will be necessary for every Plaintiff and class member, and will be dispositive of Plaintiffs' and the class members' claims. This Court finds that, given the presence of questions of fact and law common to the Plaintiffs and class members, the commonality requirement of section 2023.A.2 is satisfied.

C. Typicality

"'Like commonality, the test for typicality is not demanding.'" *James*, 254 F.3d at 571 (citation omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d at 1020. The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and legal perspective, is such that in litigating his personal claims, he can reasonably be expected to advance the interests of absent class members. *Ford v. General Motors Corp.*, No. CJ-2002-424, slip op. at 9 (Bryan County, Okla. filed Feb. 19, 2004) (memorandum opinion granting class certification). Oklahoma courts have also observed, "'Factual variations in the

individual claims will not preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1055 (Okla. Civ. App. 1999) (citation omitted), *cert. denied*, 529 U.S. 1124 (2000).

Here, the class representatives' and members' claims are all based on the same legal theories. *See, e.g.*, 1st Am. Pet.¶ 37 (breach of express warranties); *id.* ¶¶ 44, 49 (breach of implied warranties); ¶¶ 52-53 (negligence); and ¶¶ 59-62 (strict products liability). The claims all arise from the same course of alleged conduct: Ford installed in the subject vehicles defective accelerator pedals manufactured by WCI that do not meet Ford's overload engineering specifications, and consequently fail and go to idle when forcefully depressed. And the class representatives and members seek the identical remedies, which include the cost of replacing a defective pedal and/or the diminution in value of the vehicle caused by the presence of the defective accelerator. *Id.* at ¶ 33.

Defendants claim that named Plaintiffs Cuesta and Golden's claims are not typical of the class because they both allegedly had the defective pedals in their vehicles replaced. The Court finds this argument unpersuasive. The record is clear that the class members and representatives' claims are identical and based on the same core facts, and that all Plaintiffs seek the same remedy. The fact that Plaintiff Cuesta replaced his pedal at his own expense during the pendency of this litigation and under the supervision of the Defendants does not alter his legal claims or remedies. Indeed, they remain the same as the rest of the class members. Because of this identity of claims,

core facts, and remedies, the Court finds that the factual difference presented by Plaintiff Cuesta having replaced his allegedly defective pedal after filing suit does not render his claims atypical. *See Lobo*, 991 P.2d at 1055.

The central issues in this case are whether the subject accelerator pedals are defective and unreasonably dangerous, and whether these pedals give rise to breaches of Ford's and WCI's expressed and implied warranties and legal duties. If Dr. Cuesta and Mr. Golden prevail on their claims, the class members will benefit from those findings against Defendants. Likewise, if Ford and WCI prevail, the class members will be bound by those determinations. The situation presented here is such that in litigating the liability issues, the representative Plaintiffs may be reasonably expected to advance the interests of all class members. *See, e.g., Hanlon*, 150 F.3d at 1020. Typicality under 2320.A.3 exists in this case.

D. Adequacy of class representatives and counsel

"'Resolution of two questions determines legal adequacy" of the representative parties' to protect the interests of the class: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Rutter & Wilbanks Corp. v. Shell Oil* Co., 314 F.3d 1180, 1187-88 (10th Cir. 2002) (quoting *Hanlon*, 150 F.3d at 1020). Both prongs of this inquiry are satisfied here.

1. No conflict exists between Plaintiffs, their counsel, and the class members

In the context of a nationwide class action against Chrysler, the court in *Hanlon* determined there could be no conflict where "each potential plaintiff has the same problem: an allegedly defective rear latch gate which requires repair or commensurate compensation," and Plaintiff did "not propose different terms [for repair or compensation] for different class members; on the contrary, treatment of each class member [wa]s identical." 150 F.3d at 1021.

The Court finds that that is precisely the situation here. Each potential plaintiff has the same problem: a defective accelerator pedal manufactured by Williams Controls, Inc., and installed in their Ford vehicle that must be replaced. Plaintiffs do not propose different terms of repair or compensation for different class members. Rather, Plaintiffs Cuesta and Golden seek the same relief for themselves and for every member of the proposed class. *See* 1st Am. Pet ¶ 33 ("Plaintiffs and every member of the proposed class have suffered and will continue to suffer economic damages including . . ."); *see also id.* ¶ 33(a)-(e) (specifying the same types of economic damages for Plaintiffs Cuesta and Golden, and all Class Members).

Defendants argue Plaintiffs Cuesta and Golden are not adequate representatives of the class relying again on their allegation that the named Plaintiffs have replaced their pedals. This Court rejects this argument in this context as well. As explained above, the evidence reflects that Plaintiff Golden has not replaced his pedal, and Plaintiff Cuesta shares the same claims and core facts as the class members, and also seeks the same remedies. Plaintiff Cuesta's decision to minimize his chance at injury due to the de-

fective pedal by having his pedal replaced (at his own expense) during the pendency of this lawsuit (and under the supervision of the Defendants) does not put his interests in conflict with the class members. To the contrary; based on the facts presented, Plaintiff Cuesta has experienced the full cycle of events which are at issue in this case. Plaintiff Cuesta experienced the alleged defect on many occasions, and prior to filing suit he repeatedly brought his truck in to Ford dealerships complaining of acceleration problems. The pedal defect was not remedied, and after filing suit he paid to have his pedal replaced. Now Plaintiff Cuesta seeks to be reimbursed for the cost of the replacement pedal. Plaintiff Cuesta's interests in no way conflict with those of the class members.

Finally, Defendant Ford argues that Plaintiff Cuesta is not an adequate class representative because he allegedly gave his truck to his daughter and therefore does not own the Ford truck about which he complains. Plaintiffs have presented overwhelming evidence demonstrating that Dr. Cuesta owns the Super Duty truck in question. This Court rejects this particular argument of Ford's as being completely without merit.

By all accounts, the class representatives' interests are fully aligned with those of the class members, and no antagonistic interests have been identified. As such, the Court finds that the class members are adequately represented by Dr. Cuesta and Mr. Golden in this litigation.

2. Vigorous prosecution of the action

Defendants do not challenge the adequacy of class counsel. Nonetheless, this Court concludes that counsel of record are fully capable of representing the

class members. Plaintiffs are represented by: (1) Michael Burrage, a long-time Oklahoma attorney and a former U.S. District Judge for the Northern District of Oklahoma, who presided over many complex cases and has litigated several class action lawsuits; (2) Grant Harvey, Andrew Pickens, and Mark Giugliano, three partners in the Houston, Texas law firm of Gibbs & Bruns, LLP, all of whom have significant experience in litigating complex commercial cases as well as class actions; (3) Troy Greene of The Greene Law Firm based in Houston, who has substantial technical knowledge about the pedals at issue after representing the plaintiffs in the *Hudson* case in Texas state court, who alleged that a BA pedal like that at issue here was defective and unreasonably dangerous, and caused the death of plaintiffs' decedent, John Hudson; and (4) John Dowdell and Bill O'Connor, principals in the Tulsa, Oklahoma firm of Norman, Wohlgemuth, Chandler & Dowdell, who have considerable experience litigating complex commercial cases in both Oklahoma state and federal courts.

The above attorneys for the Plaintiffs are locally and nationally recognized as being highly regarded for their legal skills and their exceptional ethics, and this Court is confident that they will capably represent the interests of both the Plaintiffs and all class members. Adequacy of representation clearly exists under section 2023.A.4.

While it is not an element to consider for class certification, it should also be noted that counsel for both Defendants are all also outstanding attorneys who have conducted themselves professionally and have argued skillfully through every stage of this case. Therefore, all parties are represented by some

of the most respected and qualified attorneys in the country.

II. Predominance and Superiority under 2023.B.3

Plaintiffs seek certification of a class under section 2023.B.3. This section requires that two basic findings be made: (1) that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." OKLA. STAT. tit. 12, § 2023.B.3.

A. Common questions of law or fact predominate

"Predominance is a qualitative rather than a quantitative matter because the weight of issues may outweigh their numbers." *Mattoon v. City of Norman*, 683 P.2d 735, 739 (Okla. 1981). The inquiry "is a pragmatic one: are there enough common issues to justify a common adjudication?" *In re Copley Pharm., Inc.*, 158 F.R.D. 485, 491 (D. Wyo. 1994). In finding the requirement of predominance satisfied in a nationwide class action against Chrysler, the *Hanlon* Court noted, "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" 150 F.3d at 1022 (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1778 (2d ed. 1986)). *See also id.* ("A common nucleus of facts and potential legal remedies dominates this litigation" and supports a finding of predominance.).

After considering Plaintiffs' claims, the evidence, and Defendants' arguments, this Court finds that several common questions of fact predominate in this case: whether the pedals are defective, whether the pedals are unreasonably dangerous, and whether Defendants have breached any express or implied warranties by selling vehicles with defective pedals. This Court notes that similar questions of fact were found to predominate in *Ysbrand* and *Daffin*. *See Ysbrand v. Daimler Chrysler Corp.*, No. CJ-20000-643, slip. op. at 14 (Sequoyah County, Okla. filed Feb. 14, 2002); *Daffin*, 458 F.3d at 554. These are threshold inquiries that apply to each and every class member alike and will be dispositive of all class members' claims, all of which arise from the same core facts: To the extent any individual questions exist, against this factual back-drop, they do not predominate over the common questions of fact identified above. This predomination of common factual questions suffices alone to meet the requirements of section 2023.B.3. *See Ysbrand*, 81 P.3d at 627; *Hanlon*, 150 F.3d at 1022.

Defendants claim that a lengthy list of individualized issues abound and predominate over the common fact questions, and this Court will address some of these claims now. To begin, Ford and WCI argue there can be no predominance of factual issues because three different accelerator pedal models are implicated by Plaintiffs' allegations. However, as the Court noted above, Plaintiffs have presented sufficient evidence that these three pedals are materially the same in that they all suffer from the same alleged defect (which Defendants twice attempted to remedy with universal design changes made to all of the pedals), they all share the identical "gap" in their design, and they all use the same bracket, which,

Plaintiffs contend, based on discovery to date, is a cause of the "going to idle" defect. At this point, the Court does not perceive that any individual issues specific to any of the three pedals exist, much less predominate. But if future merits discovery reveals that individual issues arise with respect to each pedal, the Court will be free to create a subclass for each pedal and the common questions of fact listed above will still predominate.

Defendants also argue that individual fact inquiries predominate because the pedals at issue have been installed in Ford vehicles that have a variety of different characteristics and uses, therefore making it impossible to prove a class-wide defect. For example, Defendants note that the trucks may have different wheel bases, tire sizes, and transmissions, and may be driven on varying terrain by different sized drives. This Court finds this argument lacks merit. As explained above, Plaintiffs have presented sufficient evidence of a class-wide defect. Moreover, there is evidence, which appears to be uncontroverted in part, that installed pedals will fail upon applications of the same levels of force regardless of the vehicle characteristics or features in which the pedal is installed. Nor did Ford or WCI offer any evidence that the pedal overload specifications, which Plaintiffs claim the pedals failed to meet, differ or should differ depending on the features of the vehicle at issue. The evidence, therefore, confirms that variations in the vehicles have no bearing on whether the pedals can withstand the overload forces specified by Ford, and thus whether the pedals are defectively designed.

Additionally, Defendants claim that claimant-specific discovery is required, thereby defeating predo-

minance, to determine whether a class member has experienced the defect and thus may bring a claim for breach of implied warranty. The Court finds this argument lacks merit and notes that Ford has made the same argument before and it has been expressly and repeatedly rejected. *See, e.g., In re Ford Motor Co. Bronco II Prods. Liab. Litig*, No. CIV A. MDL—991, 1995 WL 714441, at *10 (E.D. La. Dec. 4, 1995) (rejecting Ford's argument for the third time that a breach of implied warranty may not be asserted absent manifestation of the defect). As the Sixth Circuit explained in the *Daffin* accelerator pedal case, regardless of whether the pedal defect in that case had manifested itself, the common questions of whether the pedals were defective, whether the defect reduced the vehicles' value, and whether Ford's warranty covered the defect predominate because all class members have the same claims based on Ford's delivering a good that does not conform to its warranty. *See Daffin*, 458 F.3d at 554. The Court finds that sound reasoning applies in this case as well. The Court notes, also, that the Oklahoma Supreme Court affirmed the class certification in *Ysbrand*, where the claims included breach of implied warranty, despite that many class members had not experienced the defect. *See Ysbrand*, 81 P.3d at 621, 623 n.2, 629.

Additionally, Defendants argue that because there are a myriad of factors and circumstances that can contribute to a vehicle "going to idle", the cause of the defect must be addressed on an individual basis rather than class-wide, and thus individualized inquiries predominate. This Court rejects Ford's argument, just as the court did in *Daffin*. As the trial court in *Daffin* explained, Ford's argument is misguided: the alleged injury is not the "going to idle" defect, but the economic loss resulting from having

such a defective pedal, and therefore the causation inquiry is much simpler and capable of being assessed on a classwide basis. *Daffin v. Ford Motor Co.*, No. C-1-00-458, slip op. at 13 (S.D. Ohio filed July 15, 2004) (Order Granting Plaintiffs' Motion for Class Certification).

Defendants also argue that common questions of law do not predominate as there is a need to apply different states' laws to this national class. In this regard, Plaintiffs have provided the Court with authorities holding, on similar facts, that the predominance requirement is met despite any choice of law issues. After reviewing Plaintiffs' authorities, as well as those cited by Defendants, this Court concludes that the alleged choice of law problems advanced by Defendants do not bar certification for several reasons.

In controlling precedent, the Oklahoma Supreme Court resolved the choice of law issues presented here in *Ysbrand*, where the court decided that a nationwide class of owners of minivans allegedly equipped with defective air bags could properly bring their warranty claims in Oklahoma courts with Michigan law applying to and governing those claims. *See Ysbrand*, 81 P.3d at 625-26. Plaintiffs have presented evidence here showing that both Ford and WCI made decisions in Michigan concerning the design, manufacture and distribution of the allegedly defective accelerator pedal systems and engaged in significant conduct in Michigan that was relevant and connected to Plaintiffs' and all class members' claims. For example, Ford's primary pedal engineers were based in Michigan, Ford promulgated the engineering specifications in Michigan and was supposed to have reviewed WCI's overload test results in Michigan to determine whether those standards were

met, Ford's engineers in Michigan approved the pedals for production, headed the investigation of the pedals, and even tested some pedals in Michigan to determine if they met Ford's engineering specifications, and Ford initiated the two universal pedal design changes from Michigan. Likewise, WCI met with Ford in Michigan several times to pitch its fixed pedals, designed its pedals to Ford's Michigan standards, and from its Michigan office, WCI negotiated the pedal contract and corresponded with Ford regarding the pedal specifications and performance goals. Per *Ysbrand*, both Defendants have the most significant contacts with Michigan, and thus Michigan law applies not only to Plaintiffs' claims against Ford but also to their claims against WCI.

Federal law likewise supports the application of Michigan law to WCI, despite that it is headquartered in a different state. WCI is the pedal subcontractor of Ford, who ultimately installed the pedals in its vehicles and sold them to the public and whose aggregation of meaningful contacts clearly points to applying Michigan law. Where, as here, the subcontractor willingly engaged in substantial business in the primary contractor's state, which is Michigan, that gave rise to the claims in the lawsuit. Michigan law is fairly applied to the subcontractor, WCI. *See Randle v. Spectran*, 129 F.R.D. 386, 393 (D. Mass. 1988).

Defendants have argued, however, that the laws of Oregon, where WCI is headquartered; or Florida, where it maintained a manufacturing facility, should apply to WCI. Even if Defendants were correct in this argument, the fact that Michigan law applies to Ford and Florida or Oregon (or another state's) law applies to WCI presents no obstacle to class certification.

Plaintiffs bring claims for breaches of express warranty, implied warranty of merchantability and warranty of fitness for a particular purpose, and for negligence and strict products liability. As shown on tables provided by Plaintiffs, the law governing these claims does not materially vary as between Michigan, Florida, Oregon or other states with arguable connections to the parties, their claims or the controversy. In other words, it does not matter which law the Court applies to Plaintiffs' claims against WCI because the result would be the same under any of these jurisdictions' laws. Common issues of law therefore exist. *See, e.g., In re LILCO Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986) ("The Court doubts that the differences in the several states' laws. . . are so great as to preclude class treatment. . . ."). Moreover, even if the laws of Michigan, Florida, or Oregon are different with respect to the Plaintiffs' claims, this difference would present no obstacle to certifying a class. In nationwide products class actions, courts have repeatedly determined that, where the law of only a few jurisdictions will govern class members' claims, class treatment is both efficient and desirable. For example, the court in *In re Asbestos Sch. Litig.* reasoned:

> "To meet the problem of diversity in applicable state law, class plaintiffs have undertaken. . . analysis of the variances in products liability among the jurisdictions. That review separates the law into four categories. Even assuming additional permutations and combinations, plaintiffs have made a creditable showing. . . that class certification does not present insuperable obstacles."

789 F2d 996, 1010 (3d Cir.), *cert. denied sub nom. Celotex Corp. v. School Dist.*, 479 U.S. 852 (1986). *See also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) ("[T]here will never be 50 different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and many use identical or virtually identical rules. In practice, the court will seldom have to deal with more than three or four formulations").

Similarly, the court in *In re Prudential Ins. Co. Sales Practices Litig.* stated, "Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit." 148 F.3d 283, 315 (3d Cir. 1998), *cert. denied sub nom. Krell v. Prudential Ins. Co.*, 525 U.S. 1114 (1999).

Further, even if the laws of Michigan and Florida or Oregon materially differed, the laws of perhaps two states would be at issue in this case. Under *Asbestos Sch. Litig.*, this number is wholly manageable in that the Court can simply instruct the jury to apply Michigan's law to Ford, and Florida's (or Oregon's) law to WCI. *See* 789 F.2d at 1010 (class device proper where four states' laws applied to issues in case).

Common questions of fact and law present a significant aspect of this case which can be resolved in a single proceeding. *Cf Hanlon*, 150 F.3d at 1022-23 (predominance existed due to commonality of substantive law, in that all claims were "local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and 'lemon laws,'" and due to common questions of fact, "particularly questions of

Chrysler's prior knowledge of the latch deficiency [and] the design defect . . ."). Section 2023.B.3 predominance plainly exists.

B. Superiority of the class device

"A class action may be maintained only when it is 'superior to other *available* methods for the fair and efficient adjudication of the controversy.'" *Ysbrand*, 81 P.3d at 628 (citation omitted). Other nationwide class actions against automobile manufacturers make clear that superiority exists here. The Oklahoma Supreme Court in *Ysbrand* noted that superiority existed where "the individual claims [we]re not substantial enough to support individual litigation. In addition, the prosecution of separate individual actions would inevitably result in inconsistent results." 81 P.3d at 628. Likewise, the *Hanlon* Court noted that "the alternative methods of resolution are individual claims for a small amount of consequential damages or latch replacement. . . [T]hese claims would not only unnecessarily burden the Judiciary, but would prove uneconomic for potential plaintiffs. . . . Litigation costs would dwarf potential recovery. . . . A fair examination . . . can only result in the apodictic conclusion that a class action is the clearly preferred procedure. . . ." 150 F.3d at 1023.

Here, the conclusion is the same. First, this Court notes that, as in *Ysbrand*, there is no administrative method of adjudication available to Plaintiffs as the NHTSA has closed its investigation related to the pedals at issue. *See Ysbrand*, 81 P.3d at 628. With no administrative alternative available, the question then becomes whether a class action is superior to individual suits. *See id.* While merits discovery is continuing, Plaintiffs have offered evidence showing that repairing the Defective Accelerators will likely

cost somewhere between $150 and $220 per vehicle. This amount is not substantial enough to support individual litigation because litigation costs would dwarf any potential recovery. Moreover, the alleged class contains more than 500,000 members. Burdening courts with 500,000 different lawsuits seeking approximately $185 in damages each would squander already-scarce judicial resources. As in *Ysbrand* and *Hanlon*, the class action device is plainly superior. Superiority of the class action device exists under section 2023.B.3.

Both requirements of predominance and superiority are satisfied in this action. The Court concludes that the case should be certified pursuant to section 2023.B.3.

It should also be noted that counsel for one of the Defendants suggested at the hearing on class certification that the class in this case should not be certified because it might cause other such cases to be filed when he said,

> "I submit that if the Court gets into the business. which Plaintiffs are urging it to do, of expanding the holding of *Ysbrand* beyond its facts, beyond the claims that are asserted here, more and more proposed, nation-wide class actions against out-of-state companies will be brought here, and other lawyers will see the pattern, and a pernicious phenomenon will start to occur."

Defense counsel's argument as to this issue is akin to asking this Court to disregard the law, simply because it might create more work for this particular court system. This Court is unaware, in all of American jurisprudence, where disregarding the appropriate legal standard is warranted when it might

lessen the Court's workload. Accordingly, this suggestion is disregarded as meritless.

Conclusion

Because this Court finds that class certification will provide a just, speedy, and inexpensive determination of this case, and because Plaintiffs' request complies with section 2023, the Plaintiffs' Motion for Class Certification is hereby GRANTED.

This Court hereby CERTIFIES the following class against Defendants Ford and WCI:

> All entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who purchased or who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one Ford truck or Ford Excursion, including, but not limited, to model years 2001.25, 2002, 2003, and 2003.25 which was marketed or manufactured by defendant Ford for sale in any of the fifty states of the United States of America or the District of Columbia, and which contains a non-adjustable, fixed electrônic throttle control ("ETC") accelerator pedal manufactured by Williams Controls, Inc., excluding entities or persons having claims for personal injuries, death or property damage other than claims for diminution in the value of the trucks or Excursions.

This Court believes that it is important to note the scope and nature of Plaintiffs' certification request in this ruling. The Plaintiffs have not requested that this Court try every facet of each claim in this case on a class basis. Nor must this Court do so in order to

certify a class. Instead, this Court FINDS that it can and will certify the case as a class action, and through section 2023.C.4, determine and try the common issues and the common claims on a class basis and address the individual issues in either single or consolidated trials should that be necessary. This Court, for the reasons stated above, declines at this juncture to decide the necessity or scope of any section 2320.C.4 subclasses. And, as stated above, this Court can revisit that issue if it becomes necessary based on the merits discovery.

This Court hereby appoints the following law firms as Class Counsel: Michael Burrage and David Burrage of the Burrage Law Firm; Grant Harvey, Andrew Pickens and Mark Giugliano of Gibbs & Bruns, LLP; John Dowdell and William O'Connor of Norman, Wohlgemuth, Chandler & Dowdell; and Troy Greene of The Greene Law Firm, P.C.

This Court notes that this certification, like all class certifications, is conditional and may be reconsidered if class treatment proves improvident.

This Court, having fully considered the positions of all the parties, notes the complete objection and exception to any party to any ruling that is adverse to that party.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Now on this 1st day of March, 2007, all of the above IS SO ORDERED!

/s/ Mark R. Campbell
MARK R. CAMPBELL, District Judge

APPENDIX B

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA DIVISION III

[Filed MAR. 21, 2008]

No. 104,480

BRAULIO M. CUESTA and ERIC L. GOLDEN, individually and on behalf of all others similarly situated,
Plaintiffs/Appellees,

vs.

FORD MOTOR, COMPANY and WILLIAMS CONTROLS, INC.,
Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY., OKLAHOMA

HONORABLE MARK R. CAMPBELL, JUDGE

REVERSED AND REMANDED

Opinion by Kenneth L. Buettner, Presiding Judge:

Defendants/Appellants Ford Motor Company (Ford) and Williams Controls, Inc. (Williams) (collectively, Appellants) appeal the trial court's order certifying a class in Plaintiffs/Appellees Braulio Cuesta's and

Eric L. Golden's (collectively, Appellees) action for negligence, strict liability, and breach of express and implied warranties relating to an alleged, design flaw in the accelerator pedal on certain Ford trucks.[1] The trial court erred in its choice of law decision. On *de novo* review of that question of law, we find that the law of the place of purchase applies to the claims asserted in this case. As a result, the nationwide class certified in this case is unmanageable because individual issues predominate over the common issues. We therefore find that the trial court abused its discretion in certifying this case as a class action proceeding. We remand for further proceedings in accordance with this opinion.

The claims in this case allege a design defect in three versions of the "electronic throttle control (ETC)" accelerator pedal designed and manufactured by Williams and installed in certain Ford vehicles. The ETC accelerator pedal sends an electronic signal to the engine in response to the driver's foot pressure on the pedal. The pedal is designed to withstand certain amounts of pressure, beyond which the electronic signal may fail. Appellees assert that when the electronic signal fails, the vehicle momentarily idles instead of accelerates. The record suggests that if the driver removes then reapplies the pressure, the vehicle will then accelerate. This lawsuit asserts that the threshold pressure level for electronic signal failure was lower in the manufactured pedals than

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[1] Orders certifying a class action are interlocutory orders appealable by right. Okla. S.Ct. Rule 1.60(g). Ford and Williams filed separate Petitions in Error. The Oklahoma Supreme Court filed an order May 17, 2007 consolidating the two appeals under surviving Case No. 104,480.

was required by Ford's engineering specifications, and that the alleged difference constitutes a defect

Cuesta filed his Petition against Appellants September 23, 2004, Cuesta added Golden as a party in the First Amended Petition, filed January 31, 2006. In the First Amended Petition, Appellees asserted a national class action on behalf of those who own or lease Ford vehicles, not limited to Super Duty pickups and Excursion sport utility vehicles with diesel engines for the model years 2001.25, 2002, 2003 and 2003.25, featuring the Williams ETC accelerator pedal.[2] Appellees asserted that the Williams pedals contained, a design or manufacturing defect "as they were not made to Ford's required engineering specifications. Consequently, when a certain amount of force is exerted on the accelerator, these accelerators—without fail—cause the vehicle to shift to idle rather than accelerate, and thus they are unreasonably dangerous." Appellees claimed that Williams had admitted in other proceedings that the pedals were unable to stay within the specified voltage parameters while under the amount of pressure established in the engineering specifications. Appellees asserted ford learned of the alleged defect in 2001, but continued to install the pedals in its vehicles and did not recall the pedals nor notify owners of the alleged defect. Appellees asserted claims for breach of express and implied warranties, strict products liability, and negligence against both Appellants.[3]

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[2] Appellees used the label "2001.25" to exclude model year 2001 vehicles in which the ETC accelerator pedal was manufactured by Teleflex.

[3] Specifically, Appellees claimed Williams designed, engineered, tested, assembled, manufactured, marketed, and distributed the allegedly defective accelerator pedals. Appellees

claimed Williams was responsible for designing and testing the pedals, and certifying to Ford that the pedals conformed to Ford's specifications. Appellees asserted Williams sold the pedals to Ford with knowledge the pedals would be installed in trucks sold in all fifty states, and that Williams thereby placed the allegedly defective pedals in the stream of commerce.

Appellees asserted Ford was responsible for designing and testing the allegedly defective pedals and verifying that the pedals conformed to Ford's specifications before installing them in its vehicles, Appellees asserted that Ford and Williams contracted for the design and manufacture of the accelerator pedals; the pedals failed to conform to Ford's engineering specifications; and Williams tested the pedals and found they did not conform to Ford's specifications.

Appellees claimed that Ford required the accelerator pedals to withstand certain amounts of pressure from the driver's foot without sending a voltage overload to the vehicle's "powertrain control module." When a voltage overload is sent to the power control module, a "disagnostic trouble code" is set which causes the vehicle to default to idle, so the driver experiences a lack of throttle response despite pressing the accelerator. Appellees alleged the pedals were defective because they sent a voltage overload at a lower amount of load or pressure than the amount required by Ford's engineering specifications.

Appellees asserted the alleged defect made the trucks containing the pedals unreasonably dangerous because the trucks could go to idle at the time the driver intended to accelerate, Appellees asserted Williams knew the pedals failed to conform to Fords specifications, but shipped the pedals to Ford with knowledge Ford would install them. However, Appellees also asserted Williams provided the pedals test results to Ford for review and approval, and Ford therefore had notice that the pedals did not comply with Ford's specifications.

Appellees claimed that after Ford learned of the alleged defect in 2001, it failed to warn customers before they purchased the trucks containing the pedals. Appellees claimed that Williams and Ford continued to manufacture and install the pedals until 2003, when Ford and Williams revised the accelerator pedals, but continued to fail to warn owners of trucks containing the defective pedals. Appellees asserted thousands of owners

continued to drive trucks containing the allegedly defective pedals and thereby endangering themselves and the public.

Appellees asserted that if they or any class members had known of the alleged defect, neither they nor any class members would have purchased the truck. They claimed Appellants' actions misled class members into buying a vehicle with an alleged defect which was unsafe. Appellees claimed the class members had been injured economically by not receiving the vehicle for which they had contracted, and by purchasing a vehicle of diminished value, and that the class members' damages were the direct and proximate result of the allegedly defective pedals being installed in Ford's trucks.

For the breach of express warranty claim, Appellees asserted class members are consumer purchasers or buyers of goods under the Uniform Commercial Code (UCC), Appellees claimed that when Williams sold the accelerator pedals to Ford, Williams expressly warranted that the pedals were free of defects, and that when Ford sold the vehicles to consumers, it expressly warranted the trucks were free of defects. Appellees claimed Williams' express warranty to Ford extended to the class members. Appellees claimed Appellants broached these express warranties by installing accelerator pedals which were allegedly defective.

Appellees next alleged Appellants breached the UCC's implied warranty of merchantability because the accelerator pedals "are not reasonably fit for the ordinary purpose of functioning as a proper accelerator that causes the vehicle to accelerate when depressed by the driver with a force within the specified engineering tolerances . . ." Appellees also claimed Appellants breached the UCC-imposed warranty of fitness for a particular purpose. Appellees asserted the purpose of the trucks was to have a safely normally functioning accelerator and vehicle, which they claimed the trucks containing the allegedly defective pedals did not meet.

Appellees next asserted a claim for negligence. Appellees alleged Appellants breached their duty to exercise ordinary care in designing, manufacturing, testing, assembling, marketing and distributing the accelerator pedals; and by failing to discover that the pedals had a defect making them unreasonably dangerous, failing to verify whether the pedals met the engi-

Cuesta averred he was a resident of Bryan County, and was the original lessee and current owner of a 2001 Ford F350 Super Duty pickup which included an ETC accelerator pedal manufactured by Williams. Tulsa County resident Golden asserted he was the original purchaser and current owner of a 2002 F450 Super Duty pickup which also included an ETC accelerator pedal manufactured by Williams. Appellees claimed they each had experienced their trucks idling when they pressed the accelerator: Cuesta over 100 times, and Golden twice.

Appellees sought purely economic damages, including the cost to repair the accelerator pedal, the cost of a loaned vehicle while the repairs were made, "a refund of the $100 deductible paid for warranty service demanded in attempts to fix the defective pedal, where applicable" (sought by Cuesta and a subset of the class, but not by Golden), diminution in the value of the trucks, and attorney fees. Appellees expressly excluded any persons claiming personal injury or property damage flowing from the claimed defect.[4]

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neering specifications, failing to test the safety of the pedals before installing them in trucks, and after discovering the alleged defect, failing to notify class members of the alleged defect either before or after purchase, and failing to offer to replace the pedals. Appellees claimed Appellants' breaches of these duties proximately caused actual, incidental, and consequential damages.

Appellees lastly raised a claim for strict products liability. Appellees listed nine ways in which the accelerator pedals were defective, but essentially they claimed the allegedly defective performance of the accelerator pedals rendered the pedals unreasonably dangerous which caused the pedals to pose a grave riskd injury or death to Appellees and the general public.

[4] This case is therefore a "no-injury" product liability case:

In the First Amended Petition, Appellees sought certification of a class, claiming eight common issues. predominated over individual issues: 1) whether the accelerators and trucks include a design or manufacturing defect; 2) "whether the Class Vehicles were marketed defectively;" 3) whether the accelerators and trucks were unreasonably dangerous for the normal, intended, and foreseeable use; 4) whether Appellants breached express and implied warranties; 5) whether Appellants acted negligently in designing, manufacturing, testing, marketing, and selling the trucks and accelerators; 6) whether Appellants were negligent in failing to warn Appellees, class members, or the public about the alleged defect; 7) whether Ford adequately warned Appellees and class members of the alleged defect and the dangers inherent in such a defect before purchase; and 8) the amount of compensation which class members are

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> The core allegation in a no-injury product liability class action is essentially the same as in a traditional products liability case: the defendant produced or sold a defective product and/or failed to warn of the product's dangers. The wrongful act in a no-injury products suit is thus the placing of a dangerous/defective product in the stream of commerce. . . . The striking feature of a typical no-injury class is that the plaintiffs have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it. Therefore, the plaintiffs in a no-injury products liability case have not suffered any physical harm or out-of-pocket economic loss.

Ziegelmann DaimlerChrysler Corp., 2002 ND 134, 649 N.W.2d 556, 564 (2002), quoting *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449,455 n. 4 (5th Cir. 2001).

entitled to recover.[5] Appellees asserted the class contained over 500,000 members.

In their Answers, filed in response to Cuesta's Petition, Ford and Williams denied the allegations. Williams particularly asserted it had no ability or responsibility to recall the trucks or give notice of the alleged defect to truck owners. Williams asserted five individual issues precluded class certification: 1) each class member's reliance on the warranties; 2) each class member's response to any hypothetical warning; 3) the actual and proximate cause of any alleged failure in the accelerator pedal assemblies; 4) the varying legal standards that would apply to the class members claims; and 5) the alleged damages sustained by each class member. Williams asserted twenty affirmative defenses.[6]

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[5] Appellees asserted each class member's damages would not exceed $75,000 to prevent removal of the case to federal court. Ford had previously sought to remove the case to federal court, and United States District Court for the Eastern District of Oklahoma granted Appellees's Motion to Remand to state court March 10, 2005. In that order, the federal court found that Appellees' claims are all based on state law.

[6] These included: 1) Williams was not subject to personal jurisdiction in Oklahoma; 2) the Petition failed to state a claim; 3) any damages sustained by Cuesta were caused or contributed to by him; 4) any damages sustained were due to unforeseeable misuse of the product; 5) Cuesta's claims were preempted by federal law; 6) the accelerator pedal assemblies were not defective or unreasonably dangerous because they were within the Comment K exception to strict tort liability under §402(A) of the Restatement (Second) of Torts; 7) failure to mitigate damages; 8) Cuesta's claims were barred by laches, waiver, and estoppel; 9) any recovery must be reduced by comparative negligence; 10) Cuesta's alleged damages were not proximately caused by Williams; 11) any alleged damages were caused by changes to Williams' products by those outside Williams' control; 12) the

In its Answer, Ford similarly denied that the pedals were defective and admitted it did not issue a recall or notice to customers. Ford asserted the Petition failed to state a claim for relief, and denied the matter was certifiable as a class action, Ford additionally denied the pedals were unreasonably dangerous. Ford asserted numerous defenses similar to those asserted by Williams.

The trial court issued its order certifying the class March 1, 2007. The trial court defined the class certified as:

> All entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who purchased or who, according to in vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one Ford Truck or Ford Excursion, including, but not limited, to model years 2001.25, 2002, 2003, and 2003.25 which was marketed or manufactured by defendant Ford for sale in any of the fifty states of the United States of America or the

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pedals were reasonably safe for their normal use based on scientific and technological knowledge at the time of manufacture; 13) Cuesta's claims were barred by the statute of limitations; 14) Cuesta sought to impose liability for conduct protected by the First Amendment; 15) Williams owed no duty nor breached any duty to Cuesta, nor caused any legally cognizable harm to Cuesta; 16) the challenged conduct was permitted by federal or state law; 17) any claims Cuesta has against Williams were not ripe for adjudication; 18) Cuesta's claims were barred because be "cannot meet the requirements for such relief;" 19) Cuesta's damages were speculative, uncertain, and incapable of being ascertained; and 20) Williams did not manufacture, design, nor distribute any product referenced in the Petition.

> District of Columbia, and which contains a non-adjustable, fixed electronic throttle control ("ETC") accelerator pedal manufactured by Williams Controls, Inc., excluding entities or persons having claims for personal injuries, death or property damage other than claims for diminution in value of the trucks or Excursions.

The trial court noted Cuesta claimed to have experienced the alleged return to idle effect over 100 times, including once when he nearly collided with another car when his truck idled while he was trying to pass another car. Cuesta alleged that he took his truck to Ford service stations on multiple occasions to complain, but Ford did not replace or fix the pedal until after Cuesta filed suit.[7] Golden claimed to have experienced his truck idling instead of accelerating twice.[8]

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[7] Based on the trial court's definition of the class, it is unclear that Cuesta remains a member of the class because the record shows his accelerator pedal has been replaced. For the same reason, it is unclear to which measure of claimed damages (replacement cost or diminution in value), if any Cuesta might now be entitled. Also, contrary to Appellees assertion, the defined class appears to include both original purchasers and current owners.

[8] The trial court noted that it could not consider the merits in making a class certification decision, but the trial court outlined Appellees' claims in its Order:

> Appellees asserted that the pedals failed the "overload test" in which the pedals were exposed to repeated foot pressure of 135 pounds and a single foot pressure load of 200 pounds, during which the pedals were expected to stay within Ford's specified voltage parameters and not break, malfunction, nor fail to respond during and after the force was applied. Appellees claimed Ford required 100% of the pedals to pass the overload test, and further required that if any pedal failed any portion of the test, then the pedal

design would be considered a failure and Ford would redesign the pedal. Appellees claimed that in July 2000, Williams conducted the first overload test on the "BA" pedal design. Appellees claimed all ten of the pedals failed portions of the overload test Appellees claimed also that Ford engineers were present during the tests and knew of the failures, but that Williams drafted test summaries indicating all of the pedals passed the overload test.

Appellees further claimed that from fall 2000 through summer 2002, 380,000 pedals of the same design were manufactured by Williams and installed in Ford trucks. The trial court found that Appellees presented evidence that "numerous Ford customers" were complaining about their trucks idling when they pressed the accelerator. Appellees claimed that Ford and Williams began developing a new accelerator pedal for the trucks in summer 2002, and that the same physical parts were used in the new pedal, which also failed the overload test.

Appellees asserted Ford then began investigating how the pedal passed the original overload test. Appellees asserted Ford representatives "have repeatedly admitted that the BA pedals were not made to Ford's engineering specifications with respect to overload." Appellees claimed Ford admitted this to the National Highway Traffic Safety Administration, but that neither Ford nor Williams ever informed the public.

The trial court found it was undisputed that in fall 2002, Ford changed the pedal design to satisfy the overload requirements. Ford named the redesigned pedal BB. The trial court found the BB pedal was installed on 2003 Ford trucks for several months until Ford switched to yet another pedal, the AC design, beginning with 2003.25 models. The trial court noted Appellees claimed that Ford discovered in January 2003 that the AC pedal also failed to meet the overload requirements. The trial court found that Ford discovered a bracket gap in each of the pedals which allowed the pedal to bend under overload forces, causing the pedal to generate out of range voltage.

Ford changed the pedal design to correct the bracket gap and began installing pedals without the gap in 2004 mod-

els. The trial court found Ford also changed the bracket gap for replacement parts. The trial court found that after Appellees filed suit, Ford alerted its dealers about the idling problem and directed its dealers to replace the pedals for customers making a warranty claim. The trial court found Ford had not informed the general public of the problem.

In a similar, unpublished decision of another division of this court, the court explained that it is error for the trial court to use the plaintiff's allegations to weigh the propriety of certifying a class:

> While we agree that a class certification hearing is not the appropriate time for a court to inquire into or measure the merits of a plaintiff's claim, *Burgess v. Farmers Ins. Co., Inc.*, 2006 OK 66, 151 P.3d 92, *Melol v. Oklahoma Farm Bureau Mutual Ins, Co.*, 2004 OK CIV APP 25, 25, 87 P. 3d 644, 649, we do not agree that the only matter appropriate for a trial court's examination is a plaintiff's allegation. Such a rule would render meaningless the need for class certification requirements and for a hearing it also would ignore the requirement that a court conduct a "rigorous analysis" of each of the elements of a class action, an analysis that "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); see also *Perry, [Perry v. Meek*, 1980 OK 151, 618 P.2d 934], 941 (generally "any determination of class status should be predicated on more information than the complaint contains").
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> According to the Oklahoma Supreme Court, in assessing a motion for class certification, a court should "take as true all the uncontroverted allegations in the instruments in the record and the undenied statements or counsel, in the briefs." *Fent v. Oklahoma Natural Gas Co.*, 2001 OK 35, 13, 27 P.3d 477; see also *Mattoon v. City of Norman*, 1981 OK 92, 11, 633 P.2d at 738. The record is replete with GM's denials of Plaintiff's substantive allegations and most of the denials are supported by evidence. Moreover, as noted above, the trial court's order itself notes that GM "vigorously contests" Plaintiff's allegations.

A party seeking certification of a class action has the burden of proving the proposed class meets all four prerequisites of 12 O.S.2001 § 2023(A), as well as one of the criteria listed in 12 O.S. 2001 §2023(B).[9]

Therefore, the trial court clearly erred in measuring the propriety of class certification by the allegations made by Plaintiff alone.

> We do not believe this legal error alone, however, is sufficient to warrant overturning the court's decision. Upon our further review of the record and application of a proper legal standard, if we determine the trial court made the correct decision even if for the wrong reason or pursuant to an improper standard, then we will affirm its order, However, if our review reveals that there is "no rational basis in the evidence for the ruling" we will reverse, *KMC Leasing*, 2000 OK 51 at 9, 9 P.3d at 688.

Caraway v. The General Motors Corporation, Unpublished Opinion No. 102,223 (2006). We discuss this decision because in this case, the trial court's order distinguishes *Caraway* by claiming that the trial court here did consider more than Appellees' allegations. However, as in *Caraway*, the trial court's order makes factual findings in favor of Appellees and shows it gave little consideration to Appellants' evidence opposing certification and little consideration to the issues weighing against certification of the class. For example, Williams notes that the trial court's order failed to mention that NHTSA closed its investigation of this issue without finding a defect.

[9] Section 2023 provides, in pertinent part:

> A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> 1. The class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law or fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

Gipson v. Sprint Communications Co., 2003 OK CIV APP 89, ¶ 16, 81 P.3d 65 (*cert. denied*); *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683, 688. The proposed class may be certified only if all four elements of § 2023(A) are met, plus one of the elements of § 2023(B). We review a class certification order for abuse of discretion; however, we review *de novo* whether the trial court applied the correct legal standard to grant certification. *Scoufos v. State Farm Fire & Cas. Co.*, 2001 Ok 113, ¶ 1, 41 P.3d. 366, 367. If the record fails to show that any of the statutory requirements for class certification have been met, then we must conclude the trial court has abused its discretion. *Greghol Ltd Partnership v. Oryx, Energy Co.*, 1998 OK CIV APP 111, 959 P.2d 596, 598.

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4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE, An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

* * *

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

[illegable]

d. the difficulties likely to be encountered in the management of a class action.

Title 12 O.S.2001 § 2023(A) requires that 1) the proposed class be so numerous that joinder of all members is impracticable (numerosity); 2) there are questions of law or fact common to all the class (commonality); 3) the claims or defenses of the representative party are typical of the class (typicality); and 4) the representative will fairly and adequately protect the interests of the class (representation).

Because it is an abuse of discretion to certify a class where the statutory requirements have not been established, we review whether the record supports the necessary elements for certification of the class. Appellants acknowledge that the class certified includes over 500,000 members. The numerosity element is not in dispute. Appellants likewise do not challenge the adequacy of class counsel.

The trial court agreed with Appellees that four common issues of law and fact exist in this case: 1) whether the pedals are defective, 2) whether the pedals are unreasonably dangerous, 3) whether the pedals reduce the value of the vehicles, and 4) whether the sale of vehicles with the pedals constituted a breach of warranty by Appellants. The trial court noted that the Sixth Circuit Court of Appeals had found nearly the same common issues in a similar case, *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006).[10] *Daffin* differs from this case in key

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[10] In *Daffin*, the court explained:

> The commonality element is satisfied. See Fed.R.Civ.P. 23 (a)(2). Common questions of law and fact are present. First, the question of whether the throttle body is defective is common to all 1999 or 2000 Villager owners because they all have the same throttle body and warranty. See *In re Teletronics*, 168 F.R.D. 203, 213 (S.D.Ohio 1996) (hold-

respects. First, the class certified was limited to owners of the subject cars within the state of Ohio, so the national choice of law issues, discussed below, were not part of that case (the decision notes the plaintiffs sought certification of a nationwide class, but the trial court certified a statewide class instead). Second, the trial court certified the class only on the issue of breach of express warranty, finding that the plaintiff's case was not typical of those seeking recovery for breach of implied warranty (albeit without explanation). As we discuss below, although these may also be common fact issues in this case, individual choice of law and damages issues predominate over the common fact issues in the class as certified here.[11]

On the issue of typicality, the trial court found the claims of Appellees and the class members were based on the same legal theories, arose of out of the

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ing that there was commonality where the plaintiffs used two "virtually identical" pacemaker models and the issue was whether the defendant's conduct caused metal-fatigue failure); cf. *In re Am. Med. Sys.*, 75 F.3d [1069] at 1081 (6th Cir. 1996) (holding that there was no commonality where class members received ten different penile implants). Second, the legal question of whether the warranty contract is properly read to contain a promise to repair the type of common 'defect' in all the 1999 or 2000 throttle body assemblies (regardless of whether or not manifested during the warranty period) is also common to the class.

458 F.3d at 552.

[11] The Sixth Circuit indicates that Ohio law would be applied to the defect/breach of warranty claims. We suspect neither the District Court nor the Sixth Court would have considered applying Michigan law to *Daffin*. This underscores how deviation from the normal choice of law rules would be problematic if done on an ad hoc basis simply to support class certification.

same course of conduct, and sought the same remedies: the cost of replacing the pedal or diminution in the vehicle's value.[12] The trial court found the fact that Cuesta had previously had the accelerator pedal on his truck replaced did not affect typicality. The trial court concluded that a judgment for Appellees or Appellants would benefit or bind the class members and that therefore Appellees claims were typical of those of the other class members.

Appellants assert Appellees' claims are not typical of the class. Ford notes that both Cuesta and Golden owned trucks with the BA version of the accelerator pedal, which Ford claims differs from the later-manufactured BB and AC pedal designs included in the class. The trial court found the pedal differences did not affect typicality because Appellees presented evidence that a bracket gap in each of the designs contributed to the return to idle condition.

Ford argues that it has defenses to Cuesta's claims that make his case unique. Those defenses include Ford's claims that: Cuesta experienced the return to idle because he abused or abnormally used the pedal, Cuesta failed to give notice of the claimed defect until after the warranty period, Cuesta could prove no damages because he and his family continued to drive the truck after experiencing the alleged defect,

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[12] Even assuming these four issues are primary, in an economic loss case the most significant relationship is where the product was sold—because the place of sale usually provides the law respecting warranties. Restatement (Second) of Conflict of Laws, § 191. A deviation from normal UCC choice of law provisions, simply to find one state's laws that could be selected in order to support a class action, would surely raise due process considerations. The notion of rule of law is upended with such ad hoc decisions.

and because Cuesta chose to purchase the truck at the end of his lease term, after experiencing the return to idle phenomenon many times during the lease period, Williams notes Cuesta's continued use of his truck after experiencing the claimed defect, and the fact that Golden has not had the accelerator pedal in his truck replaced and testified the truck has been an "excellent" vehicle. These facts suggest at a minimum that Appellees' claims will not be typical of claims made by class members legitimately claiming their vehicles are unreasonably unsafe or unfit for their intended purpose, as required for the breach of implied warranty of merchantability and strict liability claims. Williams notes also that because Appellees continue to own their trucks, they would seek the cost of replacing the accelerator pedal, while class members who had sold their trucks would be required to individually prove that they overpaid for their trucks in order to recover for diminution in value. Williams contends these facts show that Appellees claims are atypical to the degree that Appellees will not adequately represent the interests of the class members.

Williams also points to evidence that only about 1% of the warranty claims on the class trucks related to an acceleration problem. The fact that all of the trucks may contain an electronic pedal that did not exactly meet Ford's design specifications is not alone an injury. The claimed defect is that the pedals have an electric signal problem when an unusually high amount of pressure is applied. According to Appellees, the design specifications provided for such an event at a slightly higher amount of pressure than that alleged necessary to trigger the event in the pedals as manufactured. Appellees suggest that the trucks are undriveable because each has in fact

returned to idle and thereby endangered the driver. But the record suggests that event has been exceedingly rare. Those experiences are indeed not typical of the class as a whole. Additionally, the fact that Golden testified his truck has been an excellent vehicle and Cuesta chose to purchase his vehicle after leasing it, and after experiencing the alleged defect, shows that the named plaintiffs' experiences are not typical of the "unreasonably dangerous" claims asserted on behalf of the class.

The trial court noted that in *Ysbrand v. Daimler Chrysler Corp.*, 2003 OK 17, 81 P.3d 618, discussed in detail below, class representatives had not experienced the alleged air bag defect, yet that did not affect a finding of typicality. The distinction of course is that an air bag defect would only present itself following a collision, while a defect in the accelerator may be revealed in every occasion of driving - ie. in the car's daily use, without the unusual event of a collision. Here, the alleged defect could have revealed itself every time a class vehicle was driven, but the record suggests only 1% of drivers experienced the defect. While the design of the pedal may be typical, the experience of defect or unreasonably dangerousness is simply not typical of the class according to the record here.

After finding each of the §2023(A) elements present, the trial court found that certification of the class was proper under §2023(B)(3). That subsection requires a finding that common questions of law or fact predominate over the issues affecting individual class members, and whether a class action is superior to other available methods of adjudicating the controversy. The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to

warrant adjudication by representation. It has been explained that the predominance prong of § 2023(B)(3) is similar to the commonality prong of § 2023(A)(2), but that "(m)ore demanding than the commonality requirement under 23(a), 'the predominance test asks whether a. class suit is economical and efficient in the context of all issues in the suit.'" *Nicodemus Union Pacific Corp.*, 204 F.R.D. 479, 492 (D. Wyo. 2001),[13] citing Newburg and Conte, *Newburg on Class Actions*, § 4.25 (3d ed. 1982). In other words, most cases seeking certification of a class will have some common issues, but in order to meet the stricter requirement of § 2023(13), the common issues must predominate over the individual issues, to the degree that a class action proceeding is superior to individual adjudications. And, necessarily, a plaintiff who meets the predominance requirement of § 2023(B)(3) will have met the commonality requirement of § 2023(A)(2). See 7A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* §1763 p. 227 (2d. ed. 1986). Here the trial court correctly identified a handful of common fact questions. However, we hold that the individual issues predominate, in large part because they make class treatment of this case unmanageable and impractical.

Appellants assert that the trial court simply accepted Appellees' allegations of common issues without considering the evidence supporting those claims. While it is true, as noted by the trial court, that a class certification order should not address the merits of the Petition, the trial court must consider the evidence presented in order to determine if the alleged common issues are indeed common and in fact

[13] Reversed on other grounds, 440 F.3d 1227 (10th Cir. 2006).

predominate. On the record presented here, we are unable to find that the few common fact issues predominate over the individual issues, primarily the choice of law and the measure of damages, which make a nationwide class proceeding unmanageable.

The determination of choice of law is a question of law and we therefore review it *de novo*. *Edwards v. McKee*, 2003 OK CIV APP 59, 76 P.3d 73. It is an essential issue because a class action is unmanageable where several states' laws will be applicable to the various claims.

In its Order, the trial court here relied primarily on the Oklahoma Supreme Court's decision in *Ysbrand, supra*, to hold that Michigan law governed all the claims.[14] In this ease, the choice of law is particularly relevant because Appellees' strict liability claims are barred in Oklahoma under the economic loss rule.[15] *Waggoner v. Town & country Mobile Homes, Inc.*, 1990 OK 139, ¶¶ 211-22, 808 P.2d 649 (". . . when purely economic losses arc caused by a product, the economic expectations of the buyer are protected by the UCC. . . . in Oklahoma no action lies in man-

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[14] In *Ysbrand*, the plaintiffs succeeded in certifying a nationwide class of owners of certain minivans with air bags. The plaintiffs claimed the air bags deployed with excessive force and deployed during low speed collisions, both of which presented the risk of death or serious injury to children or small adults. The plaintiffs sought as damages the cost of replacement air bags. As in this case, the class in *Ysbrand* excluded anyone claiming physical injury from a deployed air bag. Unlike this case, the *Ysbrand* class also excluded those who had replaced the air bags (or deactivated them, which fact has no correlative in this case).

[15] As noted earlier, the class certified here excludes Ford truck owners with claims for personal injuries, and includes only those seeking purely economic damages.

ufacturers' products liability for injury only to the product itself resulting in purely economic loss.").[16] In Michigan, however, the economic loss rule has been applied only to claims regarding defective products purchased for commercial use. *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d. 612 (1992), And, because the class certified here includes both original purchasers and current owners, who may have bought their trucks second-hand, only original purchasers will have the privity required to establish UCC breach of warranty claims. Depending on the date of purchase, of course, some second-hand owners may continue to be covered under the express warranty.

We therefore consider whether the trial court correctly determined that Michigan law applies to the claims here based on the reasoning in *Ysbrand*. In *Ysbrand*, the trial court relied in part on the reasoning of a federal district court in Indiana, which held that the parties' relationship was "simply that of buyer and seller," so that the place of purchase was

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[16] Strict liability for defective products and manufacturers' products liability are interchangeable terms for the same claim, *Kirkland v. General Motors Corporation*, 1974 OK 52, 521 P.2d 1353. The elements of the claim are:

1) the product was the cause of the injury;

2) the defect existed in the product at the time the product left the manufacturer's possession and control;

3) the defect made the product unreasonably dangerous to the plaintiff or to the plaintiffs property.

A product is "unreasonably dangerous" if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *Id.*, citing *Restatement (Second) of Torts*, § 402A.

not significant to a claim for product defect. The Indiana court held that the place of manufacture was significant in a defect case. *Id.*, citing *In re Bridgestone/Firestone, Inc. Tires Liability Litigation,* 155 F.Supp.2d 1069 (S.D.Ind.2001). The trial court relied on the Indiana court's reasoning to find that DaimlerChrysler's principal place of business was Michigan and that Michigan law should therefore apply. The Oklahoma Supreme Court noted that the Seventh Circuit Court of Appeals overturned the lower court's choice of law analysis in *In re Bridgestone/Firestone*, based on an Indiana choice of law rule that in all but exceptional cases, the applicable law is that of the state where the harm occurred. But, the court found that the *In re Bridgestone/Firestone* trial court's analysis was supported by Oklahoma law. In *Ysbrand*, the class plaintiffs made claims for breach of warranty under the UCC as well as a claim for fraud and deceit. DaimlerChrysler asserted that common issues did not predominate because varying state laws would apply to the claims and defenses. The Oklahoma Supreme Court noted that for UCC claims, the "most significant relationship" test governs the choice of law. *Id.* at ¶ 12.

The *Ysbrand* court noted that § 191 of the *Restatement (Second) of Conflicts of Law* applies to cases involving the sale of chattels. That section provides that "*in a contract for a sale of goods, the most significant contact is the place of delivery unless another state has a more significant relationship.*" *Id.* at ¶ 14, citing *Collins Radio v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039 (emphasis added). The *Ysbrand* court relied, however, on an exception to that rule, which is that the law of a state other than the place of delivery may apply "because of the

intensity of the interest of that state in the determination of the particular issue." *Id.* citing Comment f to § 191. The court found that all 50 states had some relationship to the case because cars were delivered to customers in all 50 states, but the court held that Michigan was the one state that had a more significant relationship to the parties and the litigation because it was the principal place of business of DaimlerChrysler. The court held that "Michigan is the *only state* where conduct relevant to all class members occurred." *Id.* at ¶15 (emphasis added).

The *Ysbrand* court recognized that a choice of law decision may not be arbitrary nor fundamentally unfair. The court found that Michigan's interest in the conduct of its manufacturer was greater than the interests of the remaining states in applying their local laws. The court noted that selecting Michigan law also favored the factors listed in the Restatement including the needs of the interstate system and policies of predictability and uniformity of result. *Id.* at ¶ 16.[17] The court held that Michigan law governed

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[17] The *Restatement (Second) of Conflicts of Law* § 6, Choice-Of-Law Principles, provides several factors to consider in deciding which state's law to apply:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,

the UCC claims, but it relied on §148 of the *Restatement (Second) of Conflicts of Law* to determine that the law of each class member's home state applied to the claims for fraud and misrepresentation. The court affirmed certification of the class for the UCC claims, but reversed certification of the fraud and misrepresentation claims, finding that applying the law of 51 different states presented an overwhelming burden which made class determination of those claims unmanageable. *Id.* at ¶ 18.

In this case, the evidence does not show that Michigan is the only state where conduct relevant to all class members occurred. Instead, it shows that Ford's principal place of business was Michigan, Williams's principal place of business was Oregon, Williams's subsidiaries' principal place of business was Florida, where the accelerator pedals were designed, tested, manufactured, and sold, and the pedals were installed in Ford trucks (which were tested in Arizona) in Kentucky and Mexico. Williams argues that its only business in Michigan is an office for a sales representative. Choosing one state from among these serves the expedient of certifying a class, but that is inconsistent with both Oklahoma choice of law rules and with the requirements of § 2023(4)(3). For UCC claims, Oklahoma follows the most significant relationship test. Section 191 of the *Restatement* plainly defines the most significant relationship to a sale of chattel as the place of delivery, absent a finding that some other state has

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(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

an intensity of interest.[18] Here, there are multiple states apart from the place of delivery which might

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[18] Comments e and f to § 191 help to clarify the purpose and application of the rule:

> e. Rationale. In the absence of an effective choice of law by the parties (see § 187), the rule of this Section calls for application of the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties. Whether there is such other state should be determined in the light of the choice-of-law principles stated in § 6. For a general discussion of the application of these principles to the contracts area and of the principle favoring application of a law that would sustain the validity of the contract, see § 188, Comments b-d. What is said in these Comments is applicable here.
>
> Several factors serve to explain the importance attributed by the rule to the place of delivery. Delivery is the most significant stage of the sales transaction. It marks the point where the seller has fulfilled at least his major obligations under the contract. Delivery is also the point where, in the ease of fungible or generally described goods, the actual subject matter of the transfer will usually first become identified. So in the case of a contract for the sale of one thousand bushels of wheat, the specific grains of wheat with which the seller intends to fulfill his obligation under the contract do not become identified until they have been produced by the seller at the place of surrender. The rule also furthers the values of certainty, predictability and uniformity of result and, since the state where the delivery of the chattel is to be made will usually be readily ascertainable, of ease in the determination of the applicable law.
>
> f. When local law of state of delivery will not be applied. On occasion, a state which is not the place of delivery will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction, the parties and the chattel and hence the state of the applicable law. This may be so, for example, when the contract contemplates a continued relationship between

claim an interest. Appellees have not shown that one of them in particular has an intensity of interest in. this litigation, beyond the fact that the choice of Michigan was affirmed in *Ysbrand.* But, as noted above, in *Ysbrand,* Michigan was the only state, other than the 50 states of delivery, with conduct relevant to all the parties. Nothing in the choice of law rules or the class certification rules suggests that we pick one of several states out of a hat in order to find a most significant relationship simply to make certification seem appropriate.[19]

We must conclude that the trial court erred in finding that Michigan law applied to all of the claims here. The most significant relationship test is the applicable choice of law test for each of Appellees' claims. The *Restatement* expressly states that for sales of chattels, the most significant contact is the place of delivery, with certain exceptions, one of

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the parties which will be centered in a state other than that where delivery took place (see Illustration 5). This may also be so when the contract would be invalid under the local law of the state of delivery but valid under the local law of a state with a close relation to the transaction and the parties. In such a situation, the local law of the other state should be applied unless the value of protecting the expectations of the parties by upholding the contract is outweighed in the particular case by the interest of the state of delivery in having its invalidating law applied. There will also be occasions when the local law of some state other than that of delivery should be applied in any event because of the intensity of the interest of that state in the determination of the particular issue (see Illustration 6).

[19] Likewise, choosing Kentucky or Mexico as the place of manufacturing would raise a host of choice of law questions, as would also occur if the vehicles were manufactured by Japanese, German, Mexican, or Chinese companies.

which was relied on in *Ysbrand.* Where there are multiple possible states interested in the design, manufacture and sale of the alleged defective product, the court acts arbitrarily in choosing one of those to meet an exception to the *Restatement's* rule, which is that the "most significant contact is the place of delivery."

It is undisputed the vehicles with the Williams accelerator pedals were delivered in every state. And, the laws of the states are not uniform in application of the UCC-based warranties as well as the proof required for strict products liability claims.[20] We must conclude, based on *Ysbrand,* that where the law of multiple states will apply, a class proceeding is unmanageable and certification is therefore inappropriate.

Individual determinations of damages also make class treatment of this case unmanageable. The class in *Ysbrand* differed from that certified in this case, however, in that in *Ysbrand,* the class included those who had purchased *and* were the current owners of a subject vehicle. In this case, the class included those

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[20] In *KMC Leasing, supra,* 9 P.3d 683 at ¶ 20 the Oklahoma supreme Court explained the variety of choice of law issues in a breach of warranty case:

> . . . there lies the choice of law issue. This single issue contains a plethora of additional sub-issues, including applicable statutes of limitations and the tolling provisions of each, applicable states' breach of implied warranty provisions and statute of limitations sections or the non-uniform Uniform Commercial Code, applicable choice of law statutes and applicable statutes concerning fraud and deceit . . . . Although the determination of these issues goes to the merits of the instant case, their very existence precludes a finding of predominance as to common questions of law, if any.

who purchased *or* who are current owners of the subject vehicles. This distinction is important because former owners will be pressed to show diminution in value individually, which may vary based on whether the defect ever presented in a particular track, as well as the overall value of the truck and the conditions under which it may have been sold, such as whether the seller advised the buyer of the occurrence of the alleged defect.[21]

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[21] It is unclear whether diminution in value is an injury covered by the implied warranty of merchantability. *Carlson v. General Motors Corp.*, 883 F.2d 287, 297 (4th Cir. 1989) (explaining that the warranty is that the car is fit for its ordinary purpose, which is driving, rather than resale). The following analysis from a decision of the United States District Court for the Northern District of Oklahoma is illustrative of the problems Appellees face in making a claim for purely economic damages in this case:

> A necessary part of every breach of warranty claim is that plaintiff suffer an actual loss that was proximately caused by defendant's breach of warranty. *American Fertilizer Specialists, Inc, v. Wood*, 1981 OK 116, 635 P.2d 592, 595; *Collins Radio Co. of Dallas, Texas, v. Bell*, 1980 OK CIV APP 57, 623 P.2d. 1039, 1052. Plaintiff must also allege that he has suffered an injury and damages when claiming a breach of the implied warranty of fitness for a particular purpose under Okla. Stat tit. 12A, § 2-315. *Collins Radio Co.*, 623 P.2d at 1052.
>
> Based on the amended complaint, it is not apparent that plaintiff has suffered a manifestation of the alleged defect or that the push-in receptacles in his home are actually defective. Plaintiff cites *Seely v. White Motor Co.*, 403 P.2d 145 (Cal.1965), for the proposition that the risk of physical injury is compensable in a breach of warranty action, because the plaintiff should not have to wait for a physical injury to occur before bringing suit. *Id.* at 155. The holding of *Seely* was that purely economic loss for an intrinsic product defect can not be recovered with a tort claim, and that plaintiff's economic injury was compensable through a

Current owners may seek replacement cost as well as a loaner vehicle, and yet a third category, those class members who previously obtained a replacement

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breach of warranty claim only. See *Sharon Steel Corp. v. Lakeshore, Inc.*, 753 F.2d 851, 854 (10th Cir, 1985). However, the economic loss doctrine does not create an injury where none exists. Plaintiff argues that Leviton's products are continuously malfunctioning, consequently causing an ongoing injury.

This ease is analogous to *Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir.1999), where the Eighth Circuit dismissed a putative class action based on a claim that defendants designed an inherently defective anti look braking system. *Id.* at 626. The case was dismissed because the plaintiffs did not allege that the defect had actually caused any plaintiff an injury, and none of the plaintiffs could show he or she was entitled to damages. The plaintiffs amended their complaint to include allegations that proposed class members had suffered an accident that was caused by the defective brakes, but also continued to pursue a class action based on a theory that putative class members could, recover for an unmanifested injury. *Id.* at 629. The court stated that [w]here as in this case, a product performs satisfactorily and. never exhibits an alleged defect, no cause of action lies." *Id.* at 628. Plaintiff attempts to distinguish this case without success. He alleges that Leviton's receptacles are inherently defective and are likely to cause an injury, but he does not affirmatively state that he has suffered an injury. Therefore, plaintiff can not show that he is entitled to damages, which is a necessary element of any breach of warranty claim. *Id,* at 628-30; *Carlson* v. *General Motors Corp.*, 883 F.2d 287, 297 (4th Cir.1989).

Harrison v. Leviton Mfg. Co., 2006 WL 2990524 (N.D.Okla., 2006). Other courts have held that the implied warranty of merchantability is breached only where a vehicle manifests a defect which renders it unfit for its ordinary purpose of providing transportation. See *American Suzaki Motor Corp, v. Superior Court*, 37 Cal. App.4th 1291 (1995); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F.Supp. 595 (DC.N.Y.1982).

accelerator, like Cuesta, may seek reimbursement of a warranty deductible, or in the case of those whose warranty had expired before they sought replacement, entitlement to any damages would be uncertain. Liability for diminution in value would also be uncertain if the buyer had been advised of the alleged defect. The only potentially common element of damages in this case is the cost of a replacement accelerator pedal; the individual issues of whether the vast majority of owners who have not experienced the alleged defect would want a replacement, and how or whether to compensate those whose pedals have previously been replaced, require individual proof which makes the class certified here unmanageable.

We have found that the proper choice of law in this case is the place of delivery, which makes a nationwide class unmanageable. We do not express an opinion on whether Appellees' case may be certifiable as a statewide class, as in *Daffin, supra*, in part because of the varying damages matter discussed above. Because we find certification was error based on choice of law and damage's issues, we do not reach Appellant's other claims of error. We REVERSE AND REMAND for proceedings consistent with this opinion.

MITCHELL, V.C.J., and BELL, J., concur.

APPENDIX C

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF CIVIL APPEALS DIVISION III

April 17, 2008

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

104,480 Braulio M. Cuesta and Eric L. Golden, individually and on behalf of all others similarly situated, Plaintiffs/Appellees, vs: Ford Motor Company and Williams Controls, Inc., Defendants/Appellants.

Appellee's Petition for Rehearing is DENIED.

BUETTNER, P.J., and MITCHELL, V.C.J., concur; BELL, J., dissenting:

I would grant the Application for Rehearing. The Appellee's application has merit thus I believe the District Court did not commit error in certifying the class.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS IN CONFERENCE this 17th day of April, 2008.

/s/ Kenneth L. Buettner
Kenneth L. Buettner, Presiding Judge

APPENDIX D

SUPREME COURT OF OKLAHOMA

Nos. 104,480, 104,485.

BRAULIO M. CUESTA and ERIC L. GOLDEN,
individually and on behalf of all
others similarly situated,
Plaintiffs / Appellees,
v.
FORD MOTOR COMPANY and
WILLIAMS CONTROLS, INC.,
Defendants / Appellants.

April 21, 2009.

OPINION

WATT, J.:

This Court granted the petition for writ of certiorari of Braulio M. Cuesta and Eric L. Golden, (Plaintiffs) in their action against Ford Motor Company (Ford) and Williams Controls, Inc., (Williams) or (collectively, Defendants) to determine whether the trial court abused its discretion in certifying a class action under the facts presented. Upon review of the Oklahoma Court of Civil Appeals' (COCA) reversal of the trial court's order granting class action certification pursuant to 12 O.S. 2001 §2023,[1]

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[1] Oklahoma's statute on class action certification is found at 12 O.S. 2001 §2023 which provides, in part:

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;

2. There are questions of law or fact common to the class;

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

we find the trial court did not abuse its discretion. The trial court's order of certification is affirmed in part, reversed in part and remanded for further proceedings. The opinion of the Court of Civil Appeals is vacated.

II. PROCEDURAL HISTORY AND CONTENTIONS

Plaintiffs brought their claims against Defendants for design and/or manufacturing defects in the fixed, non-adjustable accelerator pedal, i.e., the "electronic throttle control", or "ETC", which is designed and manufactured by Williams and installed in certain

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a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

d. the difficulties likely to be encountered in the management of a class action.

C. DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

. . . .

4. When appropriate:

a. an action may be brought or maintained as a class action with respect to particular issues, or

b. a class may be divided into subclasses and each subclass treated as a class. The provisions of this section shall then be construed and applied accordingly.

trucks[2] manufactured by Ford.[3] They contend the pedals, which were modified twice, failed Ford's "overload" tests and engineering specifications. It is alleged that when forcible pressure is applied to the pedals that they cause the vehicles to shift to idle instead of accelerating and, therefore, are defective and unreasonably dangerous. Plaintiffs' theories of recovery include breach of express and implied warranties, negligence and strict products liability. However, we determine only whether class certification is appropriate to determine a breach of warranty theory under the facts presented.[4] On March 1, 2007, the

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[2] Plaintiffs' first amended petition describes the vehicles involved as "Ford Motor Co. vehicles that contain a fixed, non-adjustable accelerator designed and manufactured by Williams Controls, Inc., including, but not limited to 2001.25, 2002, 2003 and 2003.25 Ford trucks and Excursions with diesel engines."

[3] The trial court certified the following class:

> All entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who purchased or who, according to motor vehicle registration records maintained by their respective states or districts of residence or domicile, can be identified as the current owner of at least one Ford truck or Ford Excursion, including, but not limited, to model years 2001.25, 2002, 2003, and 2003.25 which was marketed or manufactured by defendant Ford for sale in any of the fifty states of the United States of America or the District of Columbia, and which contains a non-adjustable, fixed electronic throttle control ("ETC") accelerator pedal manufactured by Williams Controls, Inc., excluding entities or persons having claims for personal injuries, death or property damage, other than claims for diminution in the value of the trucks or Excursions.

[4] Because the plaintiffs seek economic damages only for, *inter alia*, the defect in the pedal or the diminution in value of the vehicle, we need not determine whether they might also recover under theories requiring the demonstration of personal injury

trial court granted Plaintiffs' Motion for Class Certification. In its order, the court discussed some of the evidence, stating:

> [P]laintiffs have presented substantial, uncontroverted evidence that Ford made two design changes to all of the pedals in an effort to remedy the "going to idle" defect. First, Ford attempted to remedy the BA pedal design (as well as the next generation pedal) by adding a forked lever arm to all existing pedals manufactured by WCI [Williams] with the goal of making the pedals more robust. But when that design modification proved insufficient, Ford then implemented a second universal design change aimed at eliminating the design gap behind all of the pedals at issue, which Ford engineers believed caused the "going to idle" defect. Plaintiffs presented evidence, in the form of Ford's documents and testimony from a Ford engineer, that all of the subject accelerator pedals share an identical 2-3 millimeter gap behind the pedal bracket in their CAD (computer-aided design) drawings and also share the identical pedal bracket.
>
> With this background, Plaintiffs claim that the following common questions of law and fact exist in this case: (1) whether the accelerator pedals at issue are defective; (2) whether the pedals are unreasonably dangerous; (3) whether the pedals reduce the value of the vehicles; and (4) whether the sale of the vehicles containing these pedals to members of the class constitutes a breach of any

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and/or damage to property other than the allegedly defective accelerator pedal, i.e., strict products liability and negligence. See ¶15 and footnote 14, *infra*.

> express or implied warranty by Defendants Ford and WCI?
>
> Based on the facts noted above and the evidence adduced to date, this Court finds, as in *Hanlon*,[5] that these questions of fact and law presented by Plaintiffs are common to the class as they stem from the allegedly defective accelerators manufactured by WCI that were installed in 2001.25, 2002, 2003 and 2003.25 Ford pickup trucks and Excursions with diesel engines. . . .

It has been alleged there are between 300,000 and 500,000 potential class members who have Ford trucks with the subject pedals, either the BA, the BB or the AC, satisfying the "numerosity" requirement for class certification. 12 O.S. 2001 § 2023(A)(1). Additionally, the trial court agreed with the Plaintiffs' asserted common questions of fact and law and found the central issues common to all class members are whether the pedals are defective and unreasonably dangerous and whether they give rise to breaches of Ford's and Williams' express and implied warranties and legal duties. The trial court also held that if the claim arises from the same event or course of conduct, and gives rise to the same legal or remedial theory, factual differences will not preclude certification, citing *Lobo Exploration Co. v. Amoco Production Co.*, 1999 OK CIV APP 112, 991 P.2d 1048, *cert. denied*, 529 U.S. 1124 (2000).

Despite Defendants' allegation that factual variations[6] between the Plaintiffs' and potential class

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[5] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

[6] Defendants alleged the plaintiffs' claims are not typical because they replaced the pedals in their vehicles. The record

members' claims preclude class certification, the trial court held the "typicality" requirement, 12 O.S. 2001 §2023(A)(3), was satisfied. The court held:

> a. the class representatives' and members' claims are based on the same legal theories: breach of express and implied warranties; negligence and strict products liability;[7]
>
> b. the claims arise from the same course of alleged conduct, i.e., Ford installed Williams' defective accelerator pedals which do not meet Ford's overload engineering specifications and which consequently fail and go to idle when forcefully depressed; and
>
> c. they seek identical remedies which include the replacement cost of the defective pedal and/or the diminution in value of the vehicle caused by the defective accelerator.

In the appeal brought by Defendants, COCA reversed the certification order, finding that individual issues predominated over the common issues and that the class was unmanageable. It held in ¶ 1:

> The trial court erred in its choice of law decision. On *de novo* review of that question of law, we find that the law of the place of purchase applies to the claims asserted in this case. As a result the nationwide class certified in this case is unmanageable because individual issues predominate over the common issues. We therefore find that the trial court abused its discretion in certifying this case as a class action proceeding.

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reflects that only Plaintiff Cuesta has replaced the pedal in his truck.

[7] See footnote 4, *supra*.

> We remand for further proceedings in accordance with this opinion.

In support of their certiorari request, Plaintiffs alleged the following:

> I. COCA's choice of law analysis directly contradicts and conflicts with this Court's ruling in *Ysbrand v. DaimlerChrysler Corp.*[8]
>
> II. COCA's ruling that individualized damages issues predominate over common issues contradicts the law of this Court and many federal courts, requiring this Court's review.
>
> III. The Court of Appeals' typicality analysis conflicts with this Court's established precedent in *Ysbrand v. DaimlerChrysler, Burgess v. Farmers Ins. Co.*,[9] and *Black Hawk Oil Co. v. Exxon Corp.*[10]
>
> IV. COCA's inquiry on the merits is contrary to United States Supreme Court precedent and this Court's decisions in *Burgess v. Farmers Ins. Co.* and *Black Hawk Oil Co. v. Exxon Corp.*

STANDARD OF REVIEW

A trial court's order certifying a class action is reviewed for an abuse of discretion. *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, 81 P.3d 618, citing *Scoufos v. State Farm Fire & Cas. Co.*, 2001 OK 113, 41 P.3d 3660. If the record does not show that the requisites for class action have been met, the trial court has abused its discretion. *Masquat v.*

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[8] 2003 OK 17, 81 P.3d 618.

[9] 2006 OK 66, 151 P.3d 92.

[10] 1998 OK 70, 969 P.2d 337.

DaimlerChrysler Corporation, 2008 OK 67, ¶ 8, 195 P.3d 48, 52, citing *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 9, 164 P.3d 1028, 1032. However, we must affirm if no such abuse of discretion is shown. *Black Hawk Oil Company v. Exxon Corporation*, 1998 OK 70, ¶ 1, 969 P.2d 337, 342. Further, this Court reviews *de novo* whether the trial court applied the correct legal standard in granting certification and will reverse the order if a question of law was decided incorrectly. *Masquat v. DaimlerChrysler Corporation*, 2008 OK 67, ¶ 8, 195 P.3d at 52, citing *Scoufos*, 2001 OK 113, ¶ 1, 41 P.3d 366, 367.

CHOICE OF LAW ANALYSIS

As stated above, Plaintiffs contend COCA completely ignored this Court's decision in *Ysbrand v. DaimlerChrysler Corp.* by focusing on the place of delivery of the trucks, rather than Ford's or Williams' principal places of business, Michigan and Florida, respectively.[11] They argue that *Ysbrand* requires the law of the state or states with the "most significant relationship"[12] to the dispute to be applied in an automobile breach of warranty case.

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[11] It is alleged that Florida is the state of Williams' principal place of business and Oregon is the state where its headquarters is located.

[12] In *Ysbrand*, we noted previous cases which had applied the "most significant relationship test" for torts and for actions that fall under Article 2 of the Uniform Commercial Code, i.e., *Bohanan v. Allstate Ins. Co.*, 1991 OK 64, 820 P.2d 787, which relied on *Collins Radio Co. v. Bell*, 1980 OK CIV APP 57, 623 P.2d 1039. This test "determines which state's law is most directly connected to the parties and the transaction." *Ysbrand*, 2003 OK 17,102, 81 P.3d at 625. It examines the "intensity of the interest" of a state, other than the state of delivery, to

In *Ysbrand*, the plaintiffs brought a lawsuit against DaimlerChrysler Corp., the manufacturer of minivans equipped with allegedly defective front passenger seat air bags. The trial court certified a class action as to claims for breach of warranty, fraud and deceit. This Court upheld the certification order as to the breach of warranty claims only. In considering the appropriate choice of law, we acknowledged the "most significant relationship test" applies to breach of warranty claims in Oklahoma. We relied on the Restatement (Second) of Conflict of Laws, § 191 (1971), Contracts to Sell Interests in Chattel, as specifically limited by the scope of comment (f). It provides:

> The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.
>
> . . .
>
> *f. When local law of state of delivery will not be applied.* On occasion, a state which is not the place of delivery will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction, the

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determine the state with the "most significant relationship to the transaction, the parties and the chattel and hence the state of the applicable law." *Ysbrand*, 2003 OK 17, 13,81 P.3d at 625.

> parties and the chattel and hence the state of the applicable law. There will also be occasions when the local law of some state other than that of delivery should be applied in any event because of the **intensity of the interest of that state** in the determination of the particular issue. . . . [emphasis added].

Under the guidance of §191, comment (f), we held in *Ysbrand*:

> [T]he particular dispute in this matter presents such an occasion in which 'the local law of some state **other than that of delivery** should be applied in any event because of the intensity of the interest of that state in the determination of the particular issue.' [emphasis added].

Ysbrand, 2003 OK 17,1113, 81 P.3d 618, 625.

We held Michigan's interest was more significant than the UCC laws of the individual states of contracting and concluded it was the state with the "most significant relationship" to the transactions and the parties:

> The *Restatement's* section 188(2) [Validity of Contracts and Rights Created Thereby] contacts of the place of contracting, the place of negotiation and performance, and the location of the subject matter are of diminished significance to the sales of the minivans.
>
> The UCC warranties are not something which is negotiated in the purchase of a new car. Thus, the relative interest of each buyer's home state in applying its version of the UCC is more or less equal. By contrast, Michigan's interest in having its regulatory scheme applied to the conduct of a

> Michigan manufacturer is most significant. Michigan is where the decisions concerning the design, manufacture, and distribution of the minivans were made. Michigan is the only state where conduct relevant to all class members occurred. The principal place of Daimler-Chrysler's business is the most important contact with respect to the UCC warranty claims.
>
> The selection of Michigan law furthers the relevant factors stated in section 6 of the *Restatement*. The needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions. While the interest of each home state in applying its local law is significant, Michigan's interest in the conduct of its manufacturer, and thus its connection to the warranty issues, is greater. Michigan law applies. . . .

Ysbrand, 2003 OK 17, ¶¶ 15, 16, 81 P.3d 618, 625-626 [emphasis added].

Plaintiffs contend the trial court's analysis in favor of Michigan was correct and should be applied. In the alternative, they argue for the application of Michigan and Florida law as the states of the defendants' respective principal places of business. Because decisions were made by each company as manufacturers in those states, Plaintiffs assert those states have a greater "intensity of interest," and therefore, the "most significant relationship" to the parties and their UCC breach of warranty claims. Plaintiffs also argue that COCA misconstrued Ysbrand when it held that if the conduct relevant to all class members

occurred in more than one state under a "most significant relationship" analysis, then the laws of all states of delivery apply automatically.

In applying Ysbrand, the trial court in the present case considered the number of significant contacts both companies have to Michigan and held that Michigan law should apply to both Ford and Williams. Williams' contacts with Michigan are numerous and significant, as noted by the trial court. It contracted with Ford in Michigan and produced the pedals as a supplier for trucks manufactured by Ford. Although certain activities may have occurred in different states, the "engineering specifications" from which Williams was to design the pedals emanated from Ford's engineers in Michigan. This is in line with *Ysbrand, supra*, wherein we found Michigan's interest in the conduct of DaimlerChrysler Corp., as manufacturer of the minivans, "and thus its connection to the warranty issues," was greater than the place of delivery for determining the Plaintiffs' claims for defective air bags. *Id.*, at 626.

Moreover, both Ford and Williams appeared to understand that Ford's requirements and specifications would govern the business relationship and that Ford directed the activities between the parties.[13] In

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[13] For example, when it was discovered that two different BA pedals failed in the Ford truck of a Ford employee, in Michigan, by going to idle with an aggressive "wide open throttle," Ford engineer Greg West, located in Michigan, sent the pedals to Williams for testing. He testified he would want to know if there were more pedals susceptible to not meeting the "overload" requirements set forth in Ford's engineering specifications. He also testified he contacted engineer Don Silampaa, formerly with Ford but who was at the time working with Williams, to ask him to provide him with all of the data relating to the production validation (PV) testing done in the summer of 2000 "to see

the alternative, the trial court ruled the application of Michigan, Florida and Oregon law was feasible because the laws were similar in the areas of negligence, strict products liability and breach of warranty in those three states. However, we have examined the tort laws of these states and have determined that Plaintiffs' request for only economic damages makes it unnecessary to consider Plaintiffs' tort theories of recovery in our choice of law analysis for class certification.[14]

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if there was any indication of why the pedals weren't passing a portion of the overload test." He also asked Williams to provide him with all of the data relating to the PV overload tests performed in 2000. He stated at his deposition he did not recall seeing the actual data that showed that every one of the units tested in 2000 had failed.

[14] See note 4, *supra*. Negligence and products liability claims require proof of personal injury and/or damage to the property other than the damaged property itself. *Henry v. The Dow Chemical Co.*, 473 Mich. 63, 701 N.W.2d 684 (2005); *Sherman v. Sea Ray Boats*, 251 Mich.App. 41, 649 N.W.2d 783 (2002); *McCathem v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320 (2001). Economic damages are not recoverable for these tort claims without such proof. *Loosli v. City of Salem*, 345 Or. 303, 193 P.3d 623 (2008); *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612 (1992). Breach of warranty claims, on the other hand, allow recovery of economic damages, such as the cost of replacement of the defective pedal and/or diminution in value of the truck. See *Gregory v. Cincinnati, Inc.*, 450 Mich. 1, 538 N.W.2d 325 (1995); *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176 (1985); *Indemnity Insurance v. American Aviation, Inc.*, 891 So.2d 532 (Fla. 2004). Oklahoma law similarly provides that no action lies in manufacturer's products liability for purely economic injury to the product itself. See *Waggoner v. Town & Country Mobile Homes, Inc.*, 1990 OK 139, 808 P.2d 649, citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) and *Moss v. Polyco*, 1974 OK 53,

For purposes of Plaintiffs' breach of warranty claims, we find that the law of Michigan, the state of Ford's principal place of business as manufacturer which controlled the specifications, requirements and testing for the pedals, has a greater "intensity of interest" than any other state involved. Its law should be applied.[15] Although Defendants and COCA would characterize this rule as an "exception" to the general rule of § 191 of the Restatement, it is the law in Oklahoma as to UCC breach of warranty claims brought against manufacturers.

Moreover, in light of the nature and extent of Williams' contacts with Ford in Michigan, we find Michigan has a significant "aggregation of contacts" such that the application of Michigan law to the breach of warranty claims is "neither arbitrary nor fundamentally unfair" and thus, constitutional. See *Ysbrand*, 2003 OK 17, ¶16,81 P.3d at 626, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

DAMAGES AND PREDOMINANCE

The trial court held Plaintiffs and class members seek identical remedies which include the replacement cost of a defective pedal and/or the diminution in value of the vehicle caused by the defective pedal. COCA held that individualized issues of damages predominate over common issues, including whether owners who have not experienced the defect would want a replacement pedal, an uncertainty making the class unmanageable.

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522 P.2d 622, 626. See also *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187.

[15] Moreover, the UCC warranty laws in Michigan are similar to those of Oregon and Florida.

Plaintiffs argue that the alleged "different types of damages sought" amount to no more than differences in the amount of monetary damages.

While Ford acknowledges the rule that predominance is not defeated by questions of individual damages as long as liability is still subject to common proof, citing *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) [emphasis added],[16] it argues Plaintiffs must provide some means of determining that each member of the class was in fact injured. Williams argues there are also conflicts among class members on the issue of damages because the defined class includes both current and former owners.[17] Oklahoma law holds that "[f]actual variations in the individual claims will not

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[16] Relying on the UCC, § 2-314, comment 15 (2004), Ford contends that in a breach of warranty action, there must be proof that the warranty existed, the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained.

[17] In their reply briefs on appeal, Plaintiffs took issue with the argument that the class definition includes former truck owners. They distinguished a case cited by Defendants, *Montgomery v. New Piper Aircraft, Inc.*, 209 F.R.D. 221 (S.D. Fla. 2002), in which the class definition included "former owners" and "current owners." The class definition in the present case does not specifically include "former owners," but those "who purchased or who . . . can be identified as the current owner. . . ." While an argument could be made for extending the class definition to former owners, an equally valid argument can be made that it includes current record owners who obtained their vehicles as purchaser or by gift or assignment. "Owner" under the Oklahoma Vehicle License and Registration Act, 47 O.S. §1102(23) is defined as "any person owning, operating or possessing any vehicle herein defined." Moreover, because Plaintiffs have taken the position that the class includes only current owners of the specified truck models, they and the Defendants are bound by it.

normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory."[18] In the present case, the trial court's holding on common fact questions follows Oklahoma precedent. Moreover, we affirm the trial court's certification order only as to Plaintiffs' breach of warranty claims for which economic damages, such as replacement costs, are appropriate. The trial court can use subclasses, if necessary, to distinguish between different types of economic damages, e.g., replacement costs, diminution in value, or the cost of a loaner vehicle, or different models of the allegedly defective pedals, i.e., the BA, BB or AC. See 12 O,S. 2001 § 2023(c)(4).

TYPICALITY AND COCA'S CONSIDERATION OF THE MERITS

Finally, Plaintiffs contend COCA's typicality analysis conflicts with this Court's well-established precedent in *Ysbrand*,[19] *Burgess*, and *Black Hawk Oil Co. v. Exxon Corp*. They also contend that COCA erred in its consideration of the merits, contrary to U.S. Supreme Court precedent and this Court's decisions *in Burgess and Black Hawk Oil Co. v. Exxon Corp*. We agree.

Plaintiffs argue that COCA based its decision as to typicality on the potential differences among class

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[18] *Masquat v. DaimlerChrysler Corporation*, 2008 OK 67, ¶ 12, 195 P.3d 48, 53, quoting *Ysbrand*, 2003 OK 17, ¶ 21,81 P.3d at 627.

[19] "It is not required that 'class members share every factual and legal predicate to meet the commonality and typicality standards.'" *Ysbrand*, 2003 OK 17, ¶ 21, 81 P.3d at 627, quoting *Newton v. Merrill Lynch*, 259 F.3d 154, 183 (3rd Cir. 2001).

representatives and members' experiences, but expressly disregarded the trial court's findings which include: (1) that the claims are based on the same legal theories, (2) that the claims arise from the same course of conduct by Defendants (Ford installed defective pedals, manufactured by Williams, which do not meet Ford's own engineering specifications); and (3) that the same remedies are being sought (cost of replacing the pedal and/or diminution in value).

Ford responds that Plaintiffs must do more than merely "allege" the claims are all based on the "same legal theories" because they "arise from the same course of Defendant's conduct" and "seek the same remedies." Ford contends COCA correctly recognized the claims Plaintiffs assert do not arise from the same course of conduct or seek the same remedies. To illustrate, Ford contends the evidence shows Cuesta knew of the alleged defect before he bought his vehicle, but paid a price which he believed took the defect and cost of repair into consideration. It also contends Cuesta experienced the "return to idle" condition more than 100 times with the pre-March 2001 pedal, but most of the class has yet to experience such problem at all with it. Defendants also discuss the fact that Plaintiff Golden has very favorable feelings about his truck, despite the defective pedal, which should somehow place his position as a class representative at odds with the remainder of the class. Ford notes that Plaintiff Golden continued to use his vehicle after discovering the alleged defect which raises certain defenses undermining typicality.

We find Defendants' arguments regarding different factual scenarios as to Dr. Cuesta and the rest of the class as to pedal replacement and experiencing the

"go to idle" condition to be unavailing. Manifestation of the defect is not required for certification. See *Daffin v. Ford Motor Company*, 458 F.3d 549 (6th Cir. 2006); see gen., *Ysbrand*, 2003 OK 17, ¶ 4, 81 P.3d 618, 623. Additionally, the record indicates Dr. Cuesta made numerous trips to the Ford dealership to complain about the accelerator pedal. It was finally replaced with Ford's assistance at Dr. Cuesta's own expense after he filed this lawsuit. We also hold that these circumstances do not take Dr. Cuesta out of the class definition, i.e., as one whose vehicle "contains" the defective pedal. To determine that these circumstances makes Dr. Cuesta atypical from the rest of the class, or to find he does not adequately represent the class, is to hold him liable for Ford's failure to replace the defective pedal at an earlier time. Moreover, the replacement cost of the pedal is still owed to Dr. Cuesta, similar to all other class members.

Plaintiffs also contend COCA erred by conducting an improper merits inquiry and making findings based on contested facts in favor of Defendants. COCA found Cuesta abused or abnormally used the pedal, distinguishing his use from that of other potential class members. However, Plaintiffs claim that Cuesta's alleged misuse was not a "fact." Moreover, they contend COCA found the "latent" defect experienced by the class representatives was "exceedingly rare," and thus, not typical of the class, because only about 1% of the warranty claims related to an acceleration problem.

Ford contends that some inquiry into the merits at the class certification stage is appropriate to the extent the merits overlap the Rule 23 criteria, citing

federal cases and cases from this Court.[20] We acknowledge that some consideration of the merits is acceptable only "insofar as they inform what individual issues might be a part of the adjudicatory process." *Masquat*, 2008 OK 67, ¶ 10, 195 P.3d 48, 53, citing Steven S. Gensler, *Civil Procedure: Class Certification and the Predominance Requirement under Oklahoma Section 2023(8)(3)*, 56 Okla. L.Rev. 289, 316 (2003).

Williams responds that COCA explained how the trial court improperly considered the merits, while also noting that Oklahoma law requires a "rigorous analysis" of each class action prerequisite which involves considerations of the factual and legal issues comprising the plaintiff's cause of action, citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364,72 L.Ed.2d 740 (1982) and *Perry v. Meek*, 1983 OK 151, 618 P.2d 934. Williams also asserts that such analysis requires more than the trial court's "uncritical acceptance" of Plaintiffs' arguments which prompted COCA's discussion of countervailing evidence on "typicality" and contends the court must identify and review the "core liability issues" asserted by the class, citing *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, 164 P.3d 1028, which cites *Scoufos v. State Farm Fire & Casualty Co.*, 2001 OK 113, 41 P.3d 366 and *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683.

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[20] Ford cites *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008); Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1178, n.2 (9th Cir. 2007); and *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶111, 164 P.3d 1028, 1032-33; *KMC Leasing v. Rockwell-Standard Corp.*, 2000 OK 51, ¶ 20, 9 P.3d 683, 690.

The record on appeal reflects that the trial court and COCA made some improper findings based on disputed facts by addressing the merits of this case. The trial court determined that Ford's engineers "discovered that a design gap existed behind the pedal bracket of the AC pedals, which they believed allowed the pedal to bend under overload forces and resulted in the pedal generating out-of-range voltages." The trial court implied that the removal of the bracket and gap, contained in the design of all three of the Williams' fixed pedals, the BA, BB and AC, led to the alleviation of the "go to idle" condition because Ford's engineers testified the gap should not have been included in any of the designs. Actually, Ford engineer Greg West testified that although he did not believe the gap should be there, he also stated that they did not see a benefit to the overload protection within the pedal after eliminating the gap in the design.

COCA's opinion refers to Ford's defenses which include that Dr. Cuesta experienced the return to idle because he abused or abnormally used the accelerator pedal in his truck. COCA then held that "[t]hese facts suggest at a minimum that Appellees' claims will not be typical of claims made by class members legitimately claiming their vehicles are unreasonably unsafe or unfit for their intended purpose, as required for the breach of implied warranty of merchantability and strict liability claims." COCA also determined that the record suggests that "only 1% of drivers experienced the defect." However, Ford engineer Greg West testified that as of September, 2003, Ford had received 10,246 complaints relating to Williams' fixed pedals installed in Super Duty trucks from October, 2000 through November, 2002. When asked, he stated he did not know if they had enough

information to determine what percentage of that number were due to pedal overload. However, he subsequently said that from reviewing the data, his "assumption" was less than 1%.[21] All of these issues are fact questions for a jury.[22]

CONCLUSION

We find the class action is a proper means of addressing these defects, as the estimated cost of a replacement pedal is $185.00. If successful, class members will be able to replace the pedals in their

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[21] We note that this number of 10,246, relating to warranty complaints of customers, does not quantify the entire proposed class for whom the defect has not manifested itself.

[22] An investigation was conducted by the National Highway Traffic Safety Administration (NHTSA). Plaintiffs and Defendants both acknowledge the investigation was closed. However, the significance of that fact is disputed. This is also a jury question. NHTSA's report, dated February 10, 2005, included in Williams' exhibits contained in its Certification Hearing Bench Book provides, in part:

> REASON FOR CLOSING:
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> [I]n light of Ford's field service action and other steps to address accelerator control concerns, 001 [Office of Defects Investigation] has determined that further investigation or action would not represent an efficient use of limited agency resources or significantly improve vehicle safety. Accordingly, ODI will close the investigation. **The closing of the investigation does not constitute a finding by NHTSA that a safety-related defect does not exist, and should not be considered as having any precedential value or effect binding the agency in future defect investigations. NHTSA will take further action if warranted by future circumstances. [emphasis added].**

trucks as part of a class action, whereas pursuing lawsuits on their own would prove too costly.

> It permits plaintiffs to 'vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.'

Ysbrand, 2003 OK 17 ¶ 6, 81 P.3d 618, 623-624, quoting *Deposit Guar., Nat'l Bank v. Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166,63 L.Ed.2d 427 (1980).

The trial court found the prerequisites for class action were met in this case. In so finding, the court did not abuse its discretion. COCA erred in reversing the certification order. We affirm the order as to class certification for the breach of warranty claims only. The other theories of recovery, i.e., for negligence and strict products liability, are not included in the certification for the reasons mentioned above.

OPINION OF THE COURT OF CIVIL APPEALS IS VACATED;

ORDER OF THE TRIAL COURT IS AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THE VIEWS EXPRESSED IN THIS OPINION EDMONDSON, C.J., HARGRAVE, OPALA, KAUGER, WATT, COLBERT, REIF, JJ.—CONCUR TAYLOR, V.C.J., WINCHESTER, J.—DISSENT